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Armed Conflicts and Human Rights Violations : Paradigmatic Critique of Canadian Refugee Law and Policy

by

Olugbenga Ayodele Shoyele

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Master of Laws

Faculty of Law

Edmonton, Alberta

Fall, 2003

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Olugbenga Ayodele, Shoyele

July 30, 2003

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Faculty of Graduate Studies and Research

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled ***Armed Conflicts and Human Rights Violations : Paradigmatic Critique of Canadian Refugee Law and Policy*** submitted by **Olugbenga Ayodele, Shoyele** in partial fulfillment of the requirements for the degree of **Master of Laws**.

PETER CARVER (Supervisor)
Assistant Professor, Faculty of Law

LINDA REIF
Professor, Faculty of Law

DR. YASMEEN ABU-LABAN
Associate Professor, Faculty of Arts
(Political Science)

Approved on 22 day of July , 2003.

Abstract

Armed conflicts, whether international or non-international in character, can lead to widespread and indiscriminate death and destruction. As a consequence of intensive fighting, social order collapses to the extent that general disorder sets in and the protection of basic rights and freedoms are neglected or becomes unrealistic. The focus of this thesis are the innocent victims of internal armed conflict fleeing this situation at home in search of refuge since State protection is no longer available.

The 1951 *Convention Relating to the Status of Refugees* and the 1967 *Protocol relating to the Status of Refugees* are the international instruments which stipulate the requirements to be fulfilled before any applicant can be conferred with the status of a Convention refugee.

Canada, a signatory state to the Refugee Convention, administers the Convention provisions as the basis of its refugee law and policy through the domestic *Immigration and Refugee Protection Act*, (IRPA), S.C. 2001, c. 27 which came into force on June 28, 2002 replacing the *Immigration Act*, R.S.C. 1985, c. 1-2. Under the statute, Convention refugee status can be conferred only on a claimant who by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion is outside his country of nationality and is unable or, by reason of that fear, unwilling to avail himself of the protection of that country; or not having a country of nationality, is outside the country of his habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

The thesis opens with conceptual clarifications of key terms which are pivotal to subsequent analyses. In the second chapter, a review of the Canadian refugee policy and law is undertaken from the legislative, executive and judicial perspectives. The third chapter examines the activities of the Immigration and Refugee Board (IRB) specifically in respect of refugee claims made by innocent

victims of internal armed conflict using the *Guidelines* concerning civilian non-combatants fearing persecution in civil war situations as issued by the Chairperson of the IRB.

Since most victims of civil conflict may be unable to establish the nexus requirement(s) under IRPA, coupled with the fact that a reformulation of the refugee definition may not be imminent, the thesis explores in chapter four how the extant human rights regime may be utilized to give interim protective respite to civil war victims. The relevance of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War and issues around the customary international law norm of temporary refugee are considered in this chapter. Chapter five positions an analysis of the regional instruments such as the OAU (now African Union) Convention and the OAS Declaration against the backdrop of chapter six which concludes the thesis with the recommendation that the Refugee Convention be reformulated in order to make innocent victims of civil conflict eligible to surrogate protection as refugees, using these regional models.

Acknowledgment

I wish to acknowledge that our Father in heaven takes the foremost glory for the commencement and completion of this project. His grace and inspiration for the courage and humility requisite for this pursuit is humongous, to say the least.

My wife, Mary and the children, `Dele and `Ronmu (Ade) next deserve great commendations for all their support, albeit the inevitable but human little annoyances and minor irritations. All is well that ends well - without being absolutely machiavellian.

I am very grateful for the benefits of the meticulous and enriching supervisory aptitude of Professor Peter Carver of the Faculty of Law, University of Alberta, Edmonton, Canada. My gratitude also extends to the entirety of the academic and non-academic members of the Faculty. The institutional and financial support of the Law Faculty is hereby acknowledged and appreciated.

I also wish to extend my appreciation to my friends and colleagues all over the world. They have been directly and indirectly my inspiration at various times.

All errors and omissions are exclusively mine and the responsibilities thereof are taken by me.

TO GOD BE THE ULTIMATE HONOUR AND GLORY.

Olugbenga Shoyele

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CHAPTER ONE

INTRODUCTION

This is a transition period in Canadian immigration and refugee protection history. The *Immigration Act*, 1976[1] which forms the basis of the bulk of extant Canadian jurisprudence was repealed and replaced by the *Immigration and Refugee Protection Act*.[2] In the course of analysis therefore, it becomes inevitable to refer to cases which were decided by the superior courts of record and quasi-judicial administrative authorities using the old statute. A conscious effort is made to point out the similarities and dissimilarities between the two statutes, and to highlight how, if and when they affect the substantive decisions which an adjudicative authority arrived at in any given case. This approach translates to a premise that the thesis will be one that comprise a criss-cross between the provisions of the old and the new statute. It ought to be mentioned in earnest too that as at the time of writing there has not been any major case decision based on the provisions of the new statute, i.e. the *Immigration and Refugee Protection Act,(IRPA)*.

1.1. Purpose of Study

James Hathaway[3] observed that, historically, the flight of over one million Russians between 1917 and 1922 and the mass movements, in the early 1920s, of thousands of Armenians from Turkey in

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[1] R.S.C. 1985, c. 1-2. Full Title: "An Act respecting immigration to Canada".

[2] S.C. 2001, c. 27. Full Title: "An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger", which came into force on June 28, 2002.

[3] J.C. Hathaway, *The Law of Refugee Status* (Toronto/Vancouver : Butterworths Canada Ltd., 1991) at 2.

order to avoid persecution and massacre by the government of that country, marked a significant milestone in the development of a refugee law regime within the international community. For all practical purposes therefore, the advent of refugee law, especially from the eurocentric perception, was catalysed by the search for a compromise between the restrictive and protectionist immigration policies of the European nations and the reality of the social crisis engendered by the massive influx of involuntary migrants into these countries. The refugee law concept has a fundamental connection with migration of persons from one place to the other. However, migration could either be voluntary or compelled. While international migration evolved from being a function of the specific needs and ambitions of the potential migrant to the use of state policy to control and maximize advantages for the sovereign nation states[4] , the need to check the invasion of the territorial integrity of states by uninvited migrants led to the erection of deterrent mechanisms by sovereign nation states.

The *Magna Carta*[5] of international refugee law, i.e. the 1951 *Convention relating to the Status of Refugees*,[6] which prescribes the requirements that must be fulfilled before a person is considered a Convention refugee, did not provide expressly for non-combatant victims of armed conflict, *simpliciter*, as potential beneficiaries of surrogate international protection as refugees. This thesis seeks to draw attention to the plight of victims of internal armed conflicts from humanitarian and human rights perspectives and asserts that they are entitled to consideration for eligibility to international protection.

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[4] F. Krenz, " The Refugee as a Subject of International Law" (1966), 15 I.C.L.Q. 90.

[5] See, J. Kumin, "Gender : Persecution in the Spotlight" (2001) Vol.2, No.123 *Refugees* 12, where this phrase was used to describe the Refugee Convention.

[6] 189 U.N.T.S. 2545, which entered into force on April 22, 1954.

The courts and administrative agencies performing quasi-judicial functions in respect of refugee status conferment in Canada are prone to underestimate human rights violations existing in war torn regions. This thesis posits that decision-makers in Canada should take into account any consistent pattern of flagrant or massive violation of human rights in the country where a civil war victim is to be returned especially if there are substantial grounds for believing that such a person would be in danger of being subjected to torture, or cruel, inhuman or degrading treatment in the home country.

1.2. Focus of Inquiry

The thesis seeks to contribute to the literature on the legal regime regulating the conferral of refugee status on persons seeking surrogate international protection in general and particularly in Canada. It utilizes as a backdrop, the experiences of victims of civil or internal armed conflicts from geo-political regions of Africa, Asia and Latin America in canvassing for a special consideration of such persons for eligibility to refugee status. The provisions of other international instruments, aside from the 1951 *Convention relating to the Status of Refugees* are used to critique the contemporary Canadian jurisprudence.

The analysis starts with the clarifying of certain key concepts. The meaning of the term "refugee" is explored from a historical perspective. The definition under the 1951 Convention is examined, along with the *1967 Protocol relating to the Status of Refugees*.[7] The United Nations High Commissioner for Refugees (UNHCR) approach is considered in the context of these previously mentioned instruments before a review of the effects of the 1977 *Draft Convention on Territorial*

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[7] 606 U.N.T.S. 8791, entered into force on October 4, 1967. Hereinafter simply referred to as the "1967 *Protocol* ".

Asylum. Various regional instruments that deal with refugee matters are later examined in a separate chapter of the thesis to facilitate a logical background to the conclusion. These include the 1969 *OAU Convention governing the specific aspects of refugee problems in Africa*[8], the 1984 *Cartagena Declaration of the Organization of American States*,[9] the *Council of Europe's Parliamentary Assembly's Recommendation 773*[10] and the 1966 *Asian African Legal Consultative Organisation's Bangkok Principles*.[11] The meaning of the term "armed conflict" is also examined in this segment of the thesis.

In order to have a good understanding of the workings of the internal system in Canada in respect of treatment of refugees, Canadian refugee policy and the refugee determination system are reviewed. The review includes the objectives of Canadian refugee policy as stated in the domestic statute,[12] refugee services provided through Citizenship and Immigration Canada and the roles of the

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[8] 1001 U.N.T.S. 45, which entered into force on June 20, 1974 - hereinafter called the ("*OAU Convention*"). As at December 31, 1995, 41 States Parties have ratified the OAU Convention and they include: Algeria, Angola, Benin, Burundi, Burkina Faso, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Mozambique, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zaire, Zambia and Zimbabwe. *Morocco, formerly a party, withdrew from the OAU in 1984, following the admission of the Sahrawi Arab Democratic Republic.

[9] *Declaracion de Cartagena* - see *Annual Report of Inter-American Commission on Human Rights 1984-85*, OEA/Ser.L/II.66, doc. 10. rev. 1, at 190-193.

[10] *"Situation of de facto refugees "* - (Adopted at the 27th Ordinary Session (3rd Part), 1976). Available online: http://www.coe.int/.../Asylum,_refugees_and_stateless_persons/Text_and_documents. Accessed on July 21, 2003.

[11] "AALCC, *The Rights of Refugees: Report of the Committee and Background Materials*", New Delhi, 1966, 207-19.

[12] *Supra*, notes 1&2.

Immigration and Refugee Board (IRB) as a quasi-judicial administrative tribunal. Finally, the role of the Federal Court of Canada in its judicial review capacity is analysed.

The thesis then turns its searchlight on the issues around victims of armed conflicts and the treatment meted out to them by the refugee determination processes and system in Canada.

Violation of human rights is then examined in the context of being a protective mechanism for innocent victims of civil war fleeing conflict situations. In this respect, the Universal Declaration of Human Rights,[13] the International Covenant on Civil and Political Rights,[14] and the International Covenant on Economic, Social and Cultural Rights[15] are used for the critique. The provisions of Article 3 of the *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*[16] are also examined as basis for violation of human rights, before the analysis of the customary international law norm of temporary refugee.

1.3. Summary of Arguments and Conclusions

In respect of victims of internal armed conflict claiming refugee status and international protection in Canada, it is argued that often their plight is linkable to human rights violations which can be perceived as persecution grounds listed in the 1951 Convention. In cases where the linkage is not so apparent, a humanitarian perspective should be explored to shield these unfortunate persons from their exposure to danger. The Convention definition as it currently stands is inadequate to deal with

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[13] U.N.G.A. Res. 217A (III), December 10, 1948.

[14] U.N.G.A. Res. 2200 (XXI), December 19, 1966.

[15] U.N.G.A. Res. 2200 (XXI), December 19, 1966.

[16] 75 U.N.T.S. 287 (Aug. 12, 1949).

contemporary realities and some other model as gleaned from the 1969 *OAU Convention* and the 1984 *OAS Cartagena Declaration* would be preferable.

The thesis takes the position that decision-makers in Canada ought to take into account any consistent pattern of flagrant or massive violation of human rights in the country where the civil war victim is to be returned. The removal of an innocent victim of civil armed conflict to a country where there is a serious risk that the person will be arbitrarily detained, denied freedom of expression and other fundamental rights constitutes, *per se*, a violation of his rights. It is contended that in Canada, the provisions of Article 3 of the 1949 Geneva Conventions, which regulates armed conflicts that are not of an international character, may be useful to a civil conflict victim who is requesting the Court grant him a temporary stay in the country pending the conclusion of an internal armed conflict taking place in his country of nationality. In addition, the norm/concept of temporary refugee which prohibits a State from forcibly repatriating foreign nationals who find themselves in its territory after having fled generalized violence and other threats to their lives and security caused by internal armed conflict within their own State, should be recognized in the international community. The Supreme Court of Canada`s decision in *Suresh -v- Canada (Minister of Citizenship and Immigration)*[17] is noted as an impressive judicial pronouncement which has rightly raised the stakes for judicial expectations and responsibilities in the continual process of striking a correct balance between a refugee`s human rights, or that of any person at all, and the sensitive issue of national security.

Terms and concepts which will be recurring need to be given contextual clarifications. Broadly, two major concepts/terms have been identified for this purpose, without prejudice to other equally

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[17] [2002] S.C.J. No. 3, 2002 SCC 1.

important terms which will be explained when they occur in the course of this intellectual pursuit. The two terms highlighted are; 'refugee' and 'armed conflict'.

1.4. The term *"Refugee"*

In ordinary parlance, the term 'refugee' has a rather loose connotation. It generically refers to someone in flight, who seeks to escape conditions or personal situations that are incongruent to what he or she can normally bear or tolerate. The typical refugee has no particular, deliberately selected destination in view. His or her prime objective is flight to freedom and safety. In the words of a legal scholar:

> —the reasons for flight may be many; flight from oppression, from a threat to life or liberty, flight from prosecution; flight from deprivation, from grinding poverty; flight from war or civil strife; flight from natural disasters, earthquake, flood, drought, famine.[18]

All these, without prejudice to their generality, are some of the basic factors that can trigger the flight of a refugee. These reasons tend to naturally testify to the proposition that the refugee deserves assistance as a human being and, if necessary, protection from the causes and inevitable effects of flight.[19] From the international legal perspective, the meaning of the term can be historically traced back to the pre-1951 era of the *Convention relating to the Status of Refugees* [20] when a number of

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[18] G.S. Goodwin-Gill, *The Refugee in International Law* (2nd Edition)(Oxford: Clarendon Press, 1996) at 3.

[19] To this extent the 'refugee' is distinguishable from the 'fugitive' from justice who is regarded as a person fleeing criminal prosecution for breach of the law in its ordinary and non-political sense.

[20] *Supra*, note 6.

accords were entered into solely in respect of refugees and their protection generally. For the purposes of convenience, the periods will be divided into three:

(a) The period between 1920 to 1935;

(b) The period between 1935 to 1939; and

(c) The period between 1938 to 1950.

During the 1920 - 1935 era, the approach of the various agreements entered into was to recognise refugees based on the factor of the deprivation of formal or *de jure* protection by the national government to this group of persons by their state of origin.[21] The disfranchisement of these persons created a unique problem for the then existing international legal regime which accorded recognition only to sovereign States and not to individuals as subjects of international law. The situation raised a simple question: Which State has legal responsibility for this group of persons? This anomaly made it necessary for the international community to evolve refugee definitions, under the aegis of the League of Nations, which ensured the establishment of an international legal order that provided for the protection of such groups of persons whose nationality had been involuntarily withdrawn.[22] This approach has been referred to as the "juridical perspective".[23]

The period between 1935 and 1939 saw the domination of a social approach in the efforts of contracting states to define refugee status in international agreements. From the "social perspec-

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[21] The withdrawal of *de jure* protection by a State could be in various forms, prominent amongst which are, denaturalisation or the withholding of travel documents and non-provision of consular representation.

[22] See, amongst others, *Minutes of the Inter-Governmental Conference on Refugee Questions*, League of Nations Doc. R/I.G.C.-10-1926 at p.4 ; *Report by the High Commissioner*, League of Nations Doc. 1926.XIII.2 (1926) at p.5 ; *Report by the Secretary-General on the Future Organisation of Refugee Work*, League of Nations Doc. 1930.XIII.2 (1930) at p.3.

[23] Hathaway, *supra,* note 3 at 2-4.

tive", refugees are viewed as helpless victims of generalized social or political developments in their home State who are deserving of some forms of humanitarian assistance to ensure their protection and safety. The scope of the international community`s perception of refugees was here extended to include groups of persons who have been deprived of State protection *de facto*. This approach to the definition of refugee by the series of international agreements[24] entered into during this period has a historical link with the activities of the international community in the protection of persons that were caught up in the crises engineered by the National Socialist regime in Germany.

The 1938 to 1950 era marked a departure from the *en bloc* approach to the definition of who a refugee is to individualized assessment standards. For the international agreements that were made during this post-war period, which also coincides with the establishment of the United Nations, "a refugee is a person in search of an escape from perceived injustice or fundamental incompatibility with her home state"[25] and her application or claim for a refugee status and international protection should be considered on its merits as an individual claim. The advent of the "individualist perspective"[26] of the 1938-1950 era effectively prepared the way for the current conception of the term within the international legal order indexed by the 1951 *Convention relating to the Status of Refugees*.[27]

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[24] *Provisional Arrangement concerning the Status of Refugees coming from Germany*, July 4,1936, 3952 L.N.T.S. 77 ; *Convention concerning the Status of Refugees coming from Germany*, February 10, 1938, 4461 L.N.T.S. 61 ; *Additional Protocol to the Provisional Arrangement and to the Convention concerning the Status of Refugees coming from Germany*, September 14, 1939, 4634 L.N.T.S. 142.

[25] Hathaway, *supra*, note 3 at 5.

[26] The International Refugee Organisation (IRO) [1946-1951] adopted the use of this standard by its classification of refugees as all persons who "in complete freedom and after receiving full knowledge of the facts .... expressed valid objections to returning to their country of origin"1(2) UNGAOR (67th Plenary Meeting) at 1454.

[27] *Supra*, note 6.

1.4.1. The term 'refugee' under the 1951 Convention

The 1951 *Convention relating to the Status of Refugees* specifically acknowledges the definition of the term refugees as established by the various previous international accords/agreements[28] and confirms the contemporary primary standard for the extension of international protection to refugees - a term which includes, in the Convention's express provisions, any person who:

> . . . as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[29]

The Convention which was drafted between 1948 and 1951 by a combination of United Nations organs, *ad hoc* committees, and a conference of plenipotentiaries, apparently excluded persons who are denied such basics as food, health care, or education from the international refugee regime, unless it can be proved that such a deprivation is connected to their civil or political status. To this extent, the Convention has sympathy only for those who have been deprived of civil and political rights and not those who are victims of socio-economic rights' deprivation. The adoption of this human rights rationale appears to be fundamentally partisan and political. It brings to the fore the cold war rivalry and division between the Eastern bloc of countries more inclined to socio-economic rights and the

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[28] Art. 1(A)(1) of the Convention provides that " For the purposes of the present Convention, the term 'refugee' shall apply to any person who: (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Convention of 28 October 1933 and February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization . . ."

[29] Art. 1(A)(2) of the Convention

Western bloc which favoured civil and political rights. The ultimate result as reflected in the mandate of the Convention shows that the Western bloc which were greater in number succeeded in imposing their standard in respect of evaluating and determining who is to be given international protection as a refugee.

Further, the Convention clearly limited the scope of mandatory international protection to refugees whose flight was caused by a pre-1951 event within Europe. It can be deduced from this that the real motivation for the drafting of the Convention was the desire of the Western European States to share the post-war refugee burden with other members of the United Nations. The realisation of this European agenda made several delegates from the developing countries object to the framing of Art. 1(A)(2) of the Convention in such a restrictive manner because aside from partly bearing the burden of European refugees within the international regime, they would be left all alone to confront the responsibilities of their own refugee populations. This appeared unfair to the developing countries which, apart from their economic disadvantages, also have the propensity for the production of larger refugee populations compared to Europe.[30]

In spite of these objections, the limitation was eventually effected and remained part of the international regime until about fifteen years later when the *Protocol relating to the Status of Refugees*[31] came into operation and expanded, as it were, the scope of the Convention definition to include refugees from all regions of the world.

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[30] See, for instance, the statement of Mr. Brohi of Pakistan: "The Pakistan delegation was of the opinion that the problem of refugees was not a European problem only and thought, therefore, that the definition of the term 'refugee' should cover all those who might reasonably fall within the scope of that term" - 11 UNESCOR (399th Meeting) at 215, August 2, 1950.

[31] *Supra*, note 7.

1.4.2. The Effect of the 1967 Protocol relating to the Status of Refugees

The Protocol provides that;

> For the purpose of the present Protocol, the term 'refugee' shall . . . mean any person within the definition of article 1 of the Convention **as if** the words 'As a result of events occurring before 1 January 1951 and . . . ' and the words '. . . as a result of such events' in article 1(A)(2) **were omitted**.[32]

The 1967 Protocol, while formally extending the scope of the term 'refugee', has a caveat to the effect that those States which had already made the declaration under Article 1(B)(1)(a) of the Convention to restrict its application in their jurisdiction to European refugees could maintain that restriction.[33] This has the effect of not substantively reviewing the content of the definition.

The failure of the Protocol to substantively alter the definition also implies that it is only persons who are forced to migrate by reasons of fear of persecution on the grounds of civil and political status that are still entitled to the benefits of international protection which derives from the Convention. In effect, most developing nations' refugees whose flights are prompted by civil strife and political instability remain excluded from the purview of the 1951 Convention and the 1967 Protocol. It is contended that since all these situations, which remain outside the mandate of the Convention, can also induce genuine fear in people and may compel them to look out for safe haven away from their homes, some mechanism should be designed by the international community to afford protection to such helpless persons whose claims to compassion is no less than that of a refugee from civil or political persecution.

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[32] Art.1(2) of the 1967 Protocol. Emphasis supplied.

[33] Art.1(3) of the 1967 Protocol.

1.4.3. The United Nations High Commissioner for Refugees (UNHCR) Approach

It was obviously the need to accommodate those persons in need of compassion and outside the mandate of both the Convention and the Protocol that prompted the international expansion of the refugee concept as was seen in later perspectives such as manifested in the UNHCR practice.[34] The Statute of the Office of the UNHCR[35] provides that:

> The competence of the High Commissioner shall extend to . . . any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or if he has no nationality, to return to the country of his former habitual residence.

The provisions of the UNHCR Statute were drafted at the same time as the Convention but differed in its recognition of "any other person" which was not contemplated by the 1951 Convention. However, since the adoption of the 1967 Protocol, the provisional scope of both the UNHCR Statute and the Convention have become identical. The problem however remained in the inability of the UNHCR to effectively respond to refugee problems arising in Africa and Asia where refugee problems are usually *en bloc* or group-oriented in perspective and nature. This is very unlike the eurocentric refugee problems which are basically individualistic in nature. The realisation of the

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[34] Refer Recommendation E of the Conference that met at the European Office of the United Nations in Geneva from 2 to 25 July, 1951 and adopted the 1951 Convention which stipulates that "[t]he Conference , expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides"- *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 189 U.N.T.S. 150.

[35] U.N.G.A. Res.428(V), December 14, 1950 (hereinafter referred to as "the Statute").

constraints faced by the UNHCR in the exercise of its mandate in respect of non-European refugees made the General Assembly, the Economic and Social Council, and the Executive Committee of the UNHCR devise ways by which the agency can intervene in such situations that were not strictly speaking envisaged by the Convention. Thus, since 1957 the *de facto* sphere of the UNHCR responsibility has expanded to cover requests made to it to act on behalf of groups "of concern" to the international community, or to "extend its good offices" to persons in need of assistance. As attributes of its extended competence, the UNHCR has been authorized, under successive resolutions of the UN General Assembly, to aid involuntary migrants including the victims of all forms of both man-made and natural disasters.[36] In addition, the organization has been requested to assist refugees who remain within their country of origin and to contribute to the resettlement of refugees who are returning home.[37] Although the extended competence of the UNHCR was initially designed to facilitate the transmission of financial support to non-mandate refugees, it has gradually been used to extend international legal protection to persons not contemplated by the Statute. It should be observed that the enhanced competence of the agency does not formally alter the Convention definition of a refugee but has broadened the circumstances in which persons could be deemed entitled to international protection.

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[36] See, *inter alia*, "Protection of and assistance to internally displaced persons" (A/RES/56/137) of 20 Feb. 2002; "Enlargement of the Executive Committee of the Programme of the UNHCR for Refugees" (A/RES/57/185) of 4 Feb 2003.

[37] See the Executive Committee of the High Commissioner's Programme, "Refugee Aid and Development", U.N. Doc. A/AC.96/662 (1985) paras. 32 and 39.

1.4.4. The Effect of the Draft Convention on Territorial Asylum, 1977

Towards the goal of rectifying the lapses of the 1951 Convention and prompted by the need to enforce the right to seek and enjoy asylum as provided in Article 14 of the Universal Declaration of Human Rights[38] and the Declaration on Territorial Asylum [39], a draft Convention on Territorial Asylum was prepared and submitted to a conference of plenipotentiaries in 1977. From a critical examination of the 1951 Convention, it becomes clear that the issue of grant of asylum was not addressed in any form as an obligation by states parties to the accord.[40] Legal scholars have pinned the reasons for this omission to, first, the fact that individuals are not strictly the proper subjects of international law and, secondly, the legal position that the right to grant asylum remains within the unfettered discretion of a State as an incident of sovereignty.[41] Thus, to fill this vacuum, the proposed Asylum Convention approved in its Article 2 that:

> Each Contracting State may grant the benefits of this Convention to a person seeking asylum, if he, being faced with a definite possibility of:
> (a) Persecution for reasons of race, colour, national or ethnic origin, religion, nationality, kinship, membership of a particular social group or political opinion, including the struggle against colonialism and *apartheid*, foreign occupation, alien domination and all forms of racism; or
> (b) Prosecution or punishment for reasons directly related to the persecution set forth in (a);
> is unable or unwilling to return to the country of his nationality or, if he has no nationality, the country of his former domicile or habitual residence.

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[38] *Supra*, note 13.

[39] U.N.G.A. Res. 2312 (XXII), December 14, 1967.

[40] The Convention stopped at the obligation of "non-refoulement", i.e. the duty to avoid the return of a refugee to a country where he faces a genuine risk of serious harm.

[41] R. Sexton, "Political Refugees, Nonrefoulement and State Practice: A Comparative Study" (1985), 18 Vand. J. Transntl. L. 731, at 737-738.

With this provision, serious changes to the definition of a refugee for purposes of entitlement to international legal protection were made, although the fundamental intention was to enhance the scope of protection available to Convention refugees[42]. For example, "political opinion" was expanded to include opposition to apartheid and colonialism, and "persecution" to consist of prosecution for offences that are directly related to intention to persecute. Further, persons at serious risk of persecution due to kinship or as a result of "foreign occupation alien domination, and all forms of racism" were to be considered for asylum. The Convention standard of "owing to a well-founded fear of persecution" was replaced with "faced with a definite possibility of persecution". Unfortunately, the drafting of the Convention on Territorial Asylum ended in a stalemate. Nonetheless, it stands out as the signpost of the preparedness of the international community to respond to the collective or *en bloc* nature of refugee movements in other parts of the world that is still developing.

1.4.5. The Canadian Perspective

The Convention definition of a "refugee" was incorporated into Canadian domestic law in 1973 and has been used since then to create an elaborate refugee jurisprudence in the country.[43] Section 96 of the *Immigration and Refugee Protection Act* defines who a Convention refugee is under the

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[42] Hathaway, *supra*, note 3 at 14

[43] See Hathaway, *supra*, note 3 at vii. The exclusion and cessation clauses of the Convention were later incorporated into the Canadian law on January 1,1989.

statute. The inference from this is that the Canadian law recognises as refugees only those who qualify as such under the Convention.[44] The relevant section provides that;

> A Convention refugee is a person who by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> > (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries, or
> > (b) not having a country or nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.[45]

Under the former Act[46] and in terms of state practice however, the Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under the *Immigration Act* to facilitate the admission of such person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.[47] This provision has

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[44] *Supra*, note 2. The statute expressly states under its interpretation section that "Refugee Convention" as used in the Act means the United Nations Convention Relating to the Status of Refugees signed at Geneva on July 28, 1951, and the Protocol thereto signed at New York City on January 31, 1967.

[45] Section 98 further specifically excludes any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof and sets out the provisions in a schedule to the *Immigration and Refugee Protection Act*. The exclusion clauses extend to (1) a person who is recognized by competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country, and (2) any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; and (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

[46] Section 187 of the IRPA, stipulates that: ". . . "former Act" means the Immigration Act, chapter 1-2 of the Revised Statutes of Canada, 1985, and where applicable, the regulations and rules made under it.

[47] *Supra,* note 1, s. 114(2). Refer also s. 25 of IRPA, *supra*, note 2.

invariably expanded the scope of the refugee meaning as prescribed in section 2(1) of the *Immigration Act,*[48] at least by providing occasional relief from a strict interpretation of s. 2(1). Special measures programs have also been established in the past to permit persons in Canada who are nationals of certain countries that are experiencing adverse domestic events to benefit from temporary asylum in the country.[49]

Canada also recognises for resettlement purposes non-Convention "designated class" refugees, in addition to those who qualify as Convention refugees, under the Overseas Refugee Selection Programs operated by some Western countries.[50] This State practice derives its mandate from section 6(3) of the *Immigration Act* which states that;

> Any Convention refugee and any person who is a member of a class designated by the Governor in Council as a class, the admission of members of which would be in accordance with Canada`s humanitarian tradition with respect to the displaced and the persecuted , may be granted admission, subject to such regulations as may be established with respect thereto and to the immigration plan currently in force and notwithstanding any other regulations made under this Act.

The *Immigration and Refugee Protection Act* has given statutory weight to the expansion of the term "refugee" and extended the grant of refugee protection to persons who are persecuted or in danger.[51] The enactment provides specifically for a strong, effective refugee protection program that

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[48] *Ibid.*

[49] See Hathaway, *supra,* note 3 at 23.

[50] *Ibid.*

[51] Section 97of IRPA provides: (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

incorporates the protection grounds of the Geneva Convention and the Convention Against Torture[52] and the grounds of risk to life or of cruel and unusual treatment or punishment. This enactment has apparently responded to the challenges faced by the rather narrow concept of "refugee" as defined in the 1951 Convention and the 1967 Protocol. It should be emphasised nonetheless, that the Convention refugee definition is still the one applicable in Canadian law.[53]

1.5. The Concept of "Armed Conflict"

The term "armed conflict" is usually deployed as an euphemism for the more intensive and less desirable term "war". Most times, analysts and commentators prefer to use "armed conflict" instead of "war" because the latter naturally connotes a very high level of intensity in the conflict, while the former denotes any use of arms between two or more belligerents, irrespective of the intensity of the

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(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

[52] 39 U.N GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51, 1984.

[53] A judicial discussion of the term "Convention refugee" was comprehensively done in the case of *Canada (Attorney General) -v- Ward* [1993] 2 S.C.R. 689. See also, Bagambiire, D., "Terrorism and Convention Refugee Status in Canadian Immigration Law: The Social Class Category According to *Ward -v- Canada*" (1993) 5 *Int. J. Ref. L.* 183.

conflict. Nonetheless, regardless of whichever of the terms is used, it is an established fact that the same set of norms govern any particular conflict.[54]

The customary international law of armed conflict which derived from the principles of the law of nations as they result from usages established among civilized peoples constitute the core foundation of the law of war in its contemporary context. It consists of a number of fundamental principles.

The first principle is that of military necessity and humanity. The Lieber Code[55] restated the principle as it developed in the seventeenth century and specified that military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contest of the war. Military necessity however does not admit of human cruelty. In modern terms, the Lieber conception of military necessity is fast becoming outdated despite the fact that it is frequently cited especially in various war crimes trials.[56]

The second principle is proportionality. It essentially refers to the notion that the losses resulting from a military act should not be excessive in relation to the anticipated military advantage. The principle cannot exist independent of a military necessity. It is most useful as a principle of civilian protection.[57]

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[54] E. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application* (The Netherlands: Kluwer Academic Publishers, 1992) at 1.

[55] Reprinted in D. Schindler & J. Toman, *The Law of Armed Conflicts* (The Netherlands: Martinus Nijhoff Publishers, 1988) at pp. 3-23.

[56] For instance, Lieber included in his extensive list of permissible actions, " all withholding of sustenance or means of life from the enemy" which invariably amounts to an endorsement of the use of starvation of civilians as a method of warfare. This is now a strictly forbidden method in contemporary international law. See, Protocol I, Art. 54(1) which states: "Starvation of civilians as a method of warfare is prohibited".

[57] Kwakwa, *supra*, note 54 at 39.

The third principle of customary international law of armed conflict is the principle of distinction. It draws the fundamental distinction between combatants and non-combatants. It requires that, in conducting hostilities, the armed forces of the belligerent parties have an obligation to draw a firm line of demarcation between civilians and civilian objects, on the one hand, and combatants and military objectives, on the other.[58]

From the perspective of contemporary international law of war regulated by Conventions, a distinction is drawn between the "law of Geneva" and the "law of the Hague". A discussion of this is germane to the analysis in this thesis.[59]

The "law of Geneva" refers to the law governing treatment of military personnel placed *hors de combat* and persons not taking part in hostilities. It consists in the main of the four Geneva Conventions of 1949[60] and the two Additional Protocols of 1977.[61] The first three Geneva Conventions address issues related to combatants while the fourth Convention, in an innovative

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[58] Ibid.

[59] This exercise becomes more necessary if advertence is made to the fact that most putative refugees are victims of war and still do not fall within the scope of the 1951 Convention.

[60] (i) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug.12, 1949, 75 U.N.T.S. 31 - the First Geneva Convention; (ii) Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 - the Second Geneva Convention; (iii) Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 - the Third Geneva Convention; (iv) Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 - the Fourth Geneva Convention.

[61] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts *(Protocol I)*, opened for signature Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I, II, 1977, reprinted in 16 I.L.M. 1391; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *Protocol II*, opened for signature Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I, II, 1977, reprinted in 16 I.L.M. 1442.

manner,[62] dealt with the needs of civilians. It is noteworthy also that while the universal concern of the Conventions is the protection of victims of war, there are certain specific themes common to all four Geneva Conventions. These common themes can be found in Article 2 and Article 3 of all the Conventions. For these reasons they are usually referred to as Common Article 2 and Common Article 3 respectively.

The "law of the Hague" determines the rights and obligations of belligerents in the conduct of hostilities and the choice of the means of harming the adversary. It comprises the Hague Conventions of 1899 which were revised in 1907,[63] the 1954 Convention for the Protection of Cultural Property,[64] and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons.[65]

Although the United Nations in Article 2(4) of its Charter imposes on all its members the duty to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations", armed conflict both at the international level as well as the domestic or national level, is not likely to cease in the foreseeable future. The defence of national boundaries, ethnic strife, struggle for self determination, religious conflicts and similar problems are so deep seated and age-

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[62] The Fourth Geneva Convention is reputed as the first to unprecedentedly confront in an exclusive manner matters concerning the treatment of civilians in time of war.

[63] Convention (IV) Respecting the Laws and Customs of War on Land, signed at the Hague Oct. 18, 1907, reprinted in D. Schindler & J. Toman (eds.), *supra*, note 55 at 63.

[64] Convention for the Protection of Cultural Property in the Event of Armed Conflict, reprinted in D. Schindler & J. Toman, *supra*, note 55 at 745.

[65] Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, reprinted in D. Schindler & J. Toman, *supra*, note 55 at 179.

long amongst many peoples that the goal of wiping out conflicts in the world is still very far from being attained.

Refugee situations can arise out of either international armed conflict or internal armed conflict. The distinction between the two has been traditionally highlighted by the law of armed conflict and is important for the critique in this thesis, even if not strictly so for international humanitarian law purposes.[66] The most important reason for this characterization lies in the fact that it enables the ascertainment of the applicable norms that are expected to govern the conduct of a particular conflict in issue.

Common Article 2 of the 1949 Geneva Conventions prescribes the threshold of applicability for norms regulating international armed conflicts. It is supplemented by the latter Protocol 1 of 1977 which extends the scope of international armed conflicts to include "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination".[67]

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[66] Some scholars have averred though that for the purpose of modern-day conflict, the internal/international armed conflict dichotomy seems an outdated phenomenon. See, for example, Reisman and Silk, 'Which Law Applies to the Afghan Conflict?', 82 *Am. J. Int'l L.* (1988) at 459, 465 ("The distinction between international wars and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law ... Paying lip service to the alleged distinction simply frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs.").

[67] *Supra*, note 61. Art. 1(4) of Additional Protocol 1 of 1977. A considerable number of major military powers have refused to ratify Protocol 1 because of this extension and other related issues. Examples of such non-ratifying military States are: Afghanistan, Chad, Ethiopia, France, India, Iran, Iraq, Israel, Lebanon, Pakistan, South Africa, U.K.,U.S.A. and Zimbabwe.

Common Article 3 governs "armed conflicts not of an international character".[68] It is generally regarded as "the most firmly established source of international law on internal law".[69] Protocol II was also later adopted ostensibly on the dismal statistics in respect of post-1945 armed conflicts which shows that roughly 80 % of victims of war are in the category of non-international conflicts. In its essence, Protocol II is the first convention which exclusively regulates internal armed conflicts as it develops and supplements Common Article 3. In scope, it is applicable to all armed conflicts which are not covered by Article 1 of Protocol I, and which take place in the territory of a State between its armed forces and dissident but organized armed groups in sufficient control of a part of the State's territory, such as to enable the group carry out "sustained and concerted military operations and to implement [Protocol II]."[70] It should be observed that Protocol II although designed to remedy the inadequacies of its sister regime, i.e. Common Article 3, has not been very well received by most Third World governments because it implicitly confers on insurgent or secessionist groups a degree of legal and political legitimacy.

Overall, the contemporary international law of armed conflict is comprised of several international instruments, the general principles of the law of nations and the customary practices of States.

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[68] The defining scope of this phrase is quite problematic as the perception of a particular conflict in issue depends heavily on a subjective appraisal of factors like the lawfulness or legitimacy of a government, the existence of a State, and the boundaries of the participants. See generally, Kwakwa, *supra* note 54 at 24.

[69] Forsythe, 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts', 72 *Am. J. Int'l L.* 272,273, 1978 - cited in Kwakwa, *ibid.*

[70] Art. 1(2) of Protocol II states: "This Protocol shall **not** apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature . . ."

CHAPTER TWO

CANADIAN REFUGEE POLICY AND THE REFUGEE DETERMINATION SYSTEM

The situation of victims of armed non-international conflict needs to be located within the broad context of Canadian refugee law and policy. This becomes imperative in the face of the trauma they usually experience as an inevitable consequence of such conflict. It is the humanitarian dispensation and provisions of countries such as Canada that may offer safety to them. This chapter demonstrates in part how refugee status can be conferred on individual applicants in Canada and how the government has erected parallel humanitarian structures to attend to other cases that fall outside of the strict purview of the Convention refugee definition.

Canada is a country that has a history of being home to millions of citizens who are descendants of refugees who fled persecution and oppression.[1] Thus, the tradition of providing a safe haven is as old as the country itself. This tradition of providing sanctuary for refugee migrants has been intertwined with Canadian history for almost two centuries now, commencing with the American slaves fleeing north via the underground railway, to the Vietnamese boat people. Since the end of the Second World War, Canada has been a refuge for more than half a million men, women and

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[1] The Doukhobors and Mennonites, for instance, are alleged to have come to Canada because they sought religious freedom. However, a school of thought opines that in reality Canada took them because the supply of strong and energetic peasants from Western Europe seemed to be depleting and there was the need to fill up the empty Prairies with viable population. The critique further posits that many of the displaced persons that were taken in as refugees by Canada were conveniently cheap labour for their Canadian hosts - G. Weiner, "Canada's Refugee Policy" in A.E. Nash, (ed.), *Human Rights and the Protection of Refugees under International Law* (Halifax, Nova Scotia: The Institute for Research on Public Policy, 1988) at p. 234.

children representing many different languages, traditions, religions and ethnic groups.[2] Canada is contemporarily home to people who have been or are still refugees from Eastern Europe, the Middle East, Asia, Africa, the Americas, and refugees who are Ugandan Asians, Salvadoreans, Hungarians, Iranians, Vietnamese, Cambodians and from almost every part of the world.[3] Although Canada`s early approach to the admission of refugees has been a subject of criticism, it has been conceded that starting with the revised *Immigration Act*,1976 and the unprecedented response to the plight of the Vietnamese boat-people, the country could genuinely claim to have acted with generosity. In the words of Gerald Weiner, a one time Minister of State for Immigration in Canada, that single incident really paved the way for the recognition by Canada that refugee policy is not simply a matter of opening doors and the passing out of travel documents but a complex process which, to be successful both for the claimant and the host country, requires a commitment beyond the policy itself.[4]

Canada has always provided resources from different co-ordinating centres, both within and outside the country, to fight poverty, diseases and famine. The Canadian International Development Agency (CIDA) has been remarkable in its reach to the developing world. The government of Canada has also contributed to the financial solvency of numerous international organizations such as the United Nations that are designed to cater to needs of peoples of the world who are seriously disadvantaged. From available statistics, in terms of actual international relief agencies, Canada`s

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[2] In recognition of Canada`s outstanding efforts on behalf of refugees, the people of Canada have been awarded the Nansen Medal by the United Nations High Commissioner for Refugees. See generally, "What it is and How it Works" - an IRB Bulletin released on the 10th Anniversary of the IRB. Available online: http://www.irb.gc.ca/crdd/wiihiw/index_e.stm. Accessed on July 18,2003.

[3] *Supra*, note 1, at 233.

[4] *Ibid*, at p. 235.

financial contribution ranks fifth in the world, while aggregate contributions to international relief are second only to the United States.[5]

Furthermore, Canada's activities are propelled by a realisation that a country with its type of considerate refugee policy will have bare claims to moral rectitude if, at the same time, it is an indiscriminate purveyor of the arms and weapons which create the refugee in the first instance. To this extent, the country is wary of which nations of the world it sells arms and ammunitions to.[6] This posture invariably goes a long way in stemming the tide of refugee production especially in such abusive States that are war prone.

2.1. Global Objective

Canada, although a forceful proponent and supporter of the International Refugee Organisation (IRO) and the successor United Nations High Commissioner for Refugee (UNHCR) did not sign the Protocol to the Geneva Convention until 1969.[7] However, it remains very active in terms of its commitments to the obligations arising under the relevant instruments. Canada recognises refugee law as a part of international human rights law which constitutes a recent and carefully constrained

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[5] *Ibid.* at p. 236. Honourable G. Weiner, asserted further that, "[i]f we are ever to eliminate the phenomenon of the refugee it will be through actions such as these, not through policies on first asylum or resettlement. It is the basic needs of mankind or, rather the lack of them, which create instability and ideological conflict and war. But until such time, individual nations will continue to struggle with the fact of the refugee, and struggle it is. Because when you strip all the niceties and the myths away, you are left with some hard decisions to make."

[6] *Ibid.*

[7] The International Refugee Organisation (IRO) was established in 1946 to take over functions of the United Nations Relief and Rehabilitation Administration. It had a Constitution which mandated it to resettle, transport, repatriate and maintain refugees as a non-permanent organisation. It had for functional purposes three principal organs, namely: a General Council, an Executive Committee and a Secretariat. It was abolished in 1952. See, chapter 1, supra, note 26.

exception to the rule of exclusive jurisdiction of States over their citizenry.[8] It is also a major global objective of the Canadian State to afford international protection to those who were able to liberate themselves from the territorial jurisdiction of a persecutory or abusive State in consonance with the 1951 Convention mandate.

It is this objective that has made it a course of unwavering administrative and judicial processes to enforce strictly the provisions of the 1951 Convention in respect of who a Convention refugee is. In this respect, Canada's scope of global or international protection excludes internal refugees who flee their homes in search of safety but remain within the boundaries of their State. Although their plight and general difficulties are comparable to those of individuals who have crossed borders, the definition of a refugee as provided by the 1951 Convention and the 1967 Protocol does not include them. Therefore, Canada also does not extend its international protection to such unfortunate persons.

Three major reasons have been canvassed for restricting eligibility to international protection to only those who are outside their State of origin or nationality by the 1951 Convention and its Protocol. In the first place, the Convention was drafted in the context of limited international resources. It was clearly stated in the preparatory documents that its intention was not to relieve the suffering of all involuntary migrants but only to assist that category of this group who lacked the protection of a government and by that fact required short-term surrogate international rights until

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[8] One of the fundamental principles of the Law of Nations since its very beginning was that of national sovereignty, which reserves to each sovereign State the exclusive right to take any action it thinks fit, provided only that the action does not interfere with the rights of other States, and is not prohibited by international law on that or any other ground. In contemporary times, the wherewithal of the United Nations can be used to intervene in the territory of a sovereign State that is persecuting its citizens by violating their basic human rights. See generally, Chapter VII of the *Charter of the United Nations*.

they acquired new or renewed national protection. The argument was that while internal refugee displacement dictates humanitarian consideration, the amount of resources that would be needed to effectively address all such situations were unavailable to the international community at that period in time.[9] Second, there was the view that the inclusion of internal refugees within the scope of international protection would encourage States to attempt to transfer or shift their responsibility for the welfare of a large part of their population to the international community. Finally, there was anxiety that any attempt to respond to the needs of internal refugees would constitute an infringement of the national sovereignty of the State within which the refugee resided.[10]

The content of the international law principle of *pacta sunt servanda*,[11] which posits that agreements between States are to be respected, is also in part responsible for the policy of Canada vis-a-vis refugees. Canadian refugee policy is designed in such a manner as to ensure adherence to the 1951 Convention and the 1967 Protocol.[12] This respect for extant international obligations manifests further in the application section of the *Immigration and Refugee Protection Act* (IRPA) which provides that;

> (3) This Act is to be construed and applied in a manner that;
> (a) furthers the domestic and international interests of Canada; . . .
> (c) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations; . . . and

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[9] See U.N. Doc. A/CONF.2/SR.21, at 12, July 14, 1951. per Mr. van Heuven Goedhart, United Nations High Commissioner for Refugees. See *infra*, chapter 3, pp. 59 - 61.

[10] J.C. Hathaway, *supra,* chapter 1, note 3, at pp. 30-31.

[11] J.G. Starke, *An Introduction to International Law* (London: Butterworth & Co. Ltd., 1958) at p.22.

[12] S.3(2)(b) of IRPA, *supra*, chapter 1, note 2, provides that one of the objectives of the Act with respect to refugees is "to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement".

(f) complies with international human rights instruments to which Canada is a signatory.[13]

The awareness of the harshness of decisions resulting from the deprivation of refugee status to internally displaced persons who are deserving of humanitarian assistance is one of the considerations that led to the enactment of the *Immigration and Refugee Protection Act* (IRPA) that is more responsive to the needs of involuntary migrants by prescribing more specific goals and objectives in refugee matters.

2.2. Specific Objectives

In dealing with the specific objectives of Canada in respect of its refugee policy, a brief consideration of its immigration policy will be instructive. Although the immigration policy of the state differs from its refugee policy as they are distinctively propelled by varying objectives[14], there is a common denominator in the sense that both the immigration and refugee determination processes are guided by the need to ascertain the admissibility and removal of persons within the territorial integrity of Canada. For historical purposes, which will further enhance the understanding of the theme in this segment of the thesis, a juxtaposition of the old statute and the IRPA is appropriate.

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[13] *Supra*, note 12. s.3(3)

[14] *Immigration Act*, 1976, *supra*, chapter 1, note 1. Immigration matters largely address situations where persons are voluntarily seeking to come into Canada, whereas refugee matters are traditionally related to cases of involuntary movement into the country. The latter is basically humanitarian from the perspective of the state, while the former is deliberately designed to permit Canada to pursue the maximum social, cultural and economic benefits it can reap from such voluntary movements.

The *Immigration Act, 1976* provides in a combined manner for the immigration and refugee objectives of the state under section 3 of the statute.[15] The section provides that;

> 3. It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need
>
> (a) to support the attainment of such demographic goals as may be established by the Government of Canada in respect of the size, rate of growth, structure and geographic distribution of the Canadian population;
>
> (b) to enrich and strengthen the cultural and social fabric of Canada, taking into account the federal and bilingual character of Canada;
>
> (c) to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;
>
> (d) to encourage and facilitate the adaptation of persons who have been granted admission as permanent residents to Canadian society by promoting cooperation between the Government of Canada and other levels of government and non-governmental agencies in Canada with respect thereto;
>
> (e) to facilitate the entry of visitors into Canada for the purpose of fostering trade and commerce, tourism, cultural and scientific activities and international understanding;
>
> (f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the Canadian Charter of Rights and Freedoms;
>
> (g) to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted;[16]
>
> (h) to foster the development of a strong and viable economy and the prosperity of all regions in Canada;
>
> (i) to maintain and protect the health, safety and good order of Canadian society; and
>
> (j) to promote international order and justice by denying the use of Canadian territory to persons who are likely to engage in criminal activity.

These objectives as enacted in the statute are non-justiciable in the sense that they do not have the status of legally enforceable rights. Nevertheless, they serve as guides for interpretations by the

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[15] *Supra*, note 14. Part I, s.3(a)-(j).

[16] It is this provision that specifically addresses the refugee objective of the state.

courts and the adjudicatory administrative authorities that have the responsibility to giving meaning to the Act and the regulations made pursuant to the Act.[17]

The *Immigration and Refugee Protection Act* (IRPA) provides a clearer statement of objectives which is responsive to new challenges and opportunities. It is one of the numerous innovations of this statute that the objectives in respect of immigration are lucidly distinguished from the objectives as regards refugees. It is expressly provided in the new Act that:

> 3. (2) The objectives of this Act with respect to refugees are
> (a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;
> (b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;
> (c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;
> (d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;
> (e) to establish a fair and efficient procedure that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;
> (f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;
> (g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and
> (h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

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[17] See, for example, *Zalzali -v- Canada (Minister of Employment & Immigration)*, [1991] 3 F.C. 605 at p. 611, where they were declared as giving mandate to the taking of a "liberal and generous approach" to interpreting the Act. Also relevant is the case of *Singh -v- Canada (Minister of Employment & Immigration)*, (1985), 17 D.L.R. (4th) 422 at p. 449, [1985] 1S.C.R. 177, and *Chan -v- Canada (Minister of Employment & Immigration)* (1994), 79 F.T.R. 263 (T.D.).

In addition to these objectives, it should be observed that section 115 of IRPA provides that:

> (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.
> (2) Subsection (1) **does not** apply in the case of a person
> (a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or
> (b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

It is posited that if a Convention refugee is found to belong to any category of these inadmissible classes, he or she may be running the risk of forfeiting his right to *non-refoulement*. This issue came up for decision in the case of *Suresh - Canada (Minister of Citizenship & Immigration)*[18] at the Supreme Court of Canada. Manickavasagam Suresh, the appellant, was born on October 21, 1955. He is a Tamil and citizen of Sri Lanka who entered Canada on October 5, 1990 and was recognized as a Convention refugee by the Refugee Division of the Immigration and Refugee Board on April 11, 1991. In the summer of 1991, the appellant applied for landing in Canada under the provisions of the *Immigration Act* which permit recognized Convention refugees to apply for permanent resident status. His application was not finalized because of a certificate issued jointly by the Solicitor General of Canada and the Minister of Citizenship and Immigration alleging that he was inadmissible to Canada on security grounds. During his time in Canada, until his detention on October 18, 1995, the appellant worked with the World Tamil Movement (WTM), eventually as its fundraising co-ordinator.

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[18] (2002) 208 D.L.R. (4th) 1, [2002] S.C.J. No. 3, online: QL (SCJ). See, P. Carver, "Shelter from the Storm : A Comment on *Suresh -v- Canada (Minister of Citizenship and Immigration)*" Vol. 40, No. 2. *Alberta Law Review* 465.

He also acted as a co-ordinator for the Federation of Associations of Canadian Tamils (FACT). The certificate was based on the opinion of the Canadian Security Intelligence Service (CSIS) which advised the responsible Ministers that there were reasonable grounds to believe that the appellant was a member of the Liberation Tigers of Tamil Eelam (LTTE), an organization alleged to engage in terrorism. CSIS alleged that LTTE operates in Canada under the auspices of a front organization, the WTM, for the purpose of fundraising, propaganda and procurement of material. The appellant was alleged to have procured materials, some of which may have military application. On January 6, 1998, the Minister of Citizenship and Immigration rendered a decision pursuant to paragraph 53 (1)(b) of the Act that the appellant posed a danger to the security of Canada. Suresh's application for judicial review was dismissed by McKeown, J.[19] Suresh appealed to the Federal Court of Appeal unsuccessfully[20] and thereafter proceeded to the Supreme Court.

The Supreme Court held that pursuant to section 7 of the *Canadian Charter of Rights and Freedoms*, deportation to face torture is generally unconstitutional, even where national security interests are at stake. It concluded that the appellant made a *prima facie* case showing a substantial risk of torture if deported to Sri Lanka. The Supreme Court however noted that it does not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1. The ambit of this exceptional discretion to deport to torture, it concluded, awaits future cases.

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[19] [1999] F.C.J. No. 865, [1997] F.C.J. No. 1537, online:(QL) (FCTD).

[20] [2000] F.C.J. No. 5, (Decary, Linden & Robertson, JJ.), online: QL (FCA).

The discussion above reflects the legislative framework of the objectives of the Canadian refugee policy within which the executive and the judicial branches of the state are expected to operate. It is worthwhile to examine the activities of these organs of government thematically.

2.3 Refugee Services of Citizenship and Immigration Canada (CIC)

The government department that is vested with the responsibility for administering state policy in respect of refugees, immigrants and visitors is Citizenship and Immigration Canada. For the practical purpose of implementing this sensitive duty, the department has created several branches within its structural hierarchy and given mandate to each branch.

The mandate of the Refugees Branch of Citizenship and Immigration Canada (CIC) is the most apposite for our analysis. This Refugees Branch plays a very important role in the maintenance of the renowned humanitarian tradition of Canada.[21] On a constant and continuing basis, it develops policies and designs programs for the resettlement of refugees from abroad, and oversees the implementation of these programs by Citizenship and Immigration Canada through a network of national and international partnerships as the needs arise. The Refugees Branch usually represents the interests of the CIC and the government of Canada on multilateral and international fora where issues relating to refugees crop up.[22] The Branch implements its mandate through the various

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[21] *Supra*, note 2.

[22] See "CIC Canada / The Canadian Refugee System: Introduction", p. 1. Available online: http://www.cic.gc.ca/english/refugee/refl-e.html. Accessed on July 18, 2003.

activities of its subordinate divisions which include; (i) International Liaison (SRK); (ii) Asylum (SRO); (iii) Resettlement (SRE); and Refugee Program Support (SRS).[23]

Under the statutory authority of the Immigration and Refugee Protection Act and regulations emanating therefrom, eligibility of a person seeking Convention refugee status is determined. A refugee claimant can make a claim upon arrival at the port of entry or by someone already in Canada, whether as a legal visitor or without legal status, by notifying an immigration officer.[24] It is the duty of an immigration officer to decide whether a person is eligible to have a claim determined by the Refugee Protection Division of the Immigration and Refugee Board (IRB) or not.[25]

In the ascertainment of the eligibility of a claimant, the immigration officer must take note of these categories of persons who are not eligible:

- persons recognized as Convention refugees by another country to which they can be returned;[26]
- persons already considered Convention refugees according to Canada's Immigration and Refugee Protection Act or Regulations;[27]
- persons who have arrived in Canada from a prescribed country. A prescribed country is one which does not return refugees to nations where their life or freedom would be threatened for reasons of race, religion, nationality or membership in a particular social group or political opinion (to date there is no list of prescribed countries);[28]

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[23] *Ibid.*

[24] S. 99(3) of IRPA. However, a person who is subject to a removal order may not make such a claim.

[25] *Infra*, for a discussion of the operation of the Refugee Protection Division of the Immigration and Refugee Board (IRB) which determines refugee status conferment on claimant at an oral hearing as an independent tribunal making quasi-judicial decisions.

[26] S. I01(1)(d) of IRPA. See *Canada (Minister of Employment & Immigration -v- Letshou-Olembo* (1990), 73 D.L.R. (4th) 560.

[27] S. 101(1)(a) of IRPA.

[28] S. 101(1)(e) of IRPA.

- persons who have been found ineligible by an immigration officer or have been determined not to be a refugee by the Immigration and Refugee Board (this provision does not apply to persons who have been subsequently out of Canada for more than 90 days);[29]
- persons who have been convicted of serious criminal offences or to be terrorists, subversives, or war criminals, and whom the Minister of Citizenship and Immigration has determined should not be in Canada because they pose a danger to Canadians or the national interest;[30]
- persons subject to an unexecuted removal order.[31]

Where a determination is made to the effect that a claimant is not eligible to make a claim, an application may be made for leave for judicial review of the immigration officer`s determination.[32] If a claimant is determined to be eligible but found to have been convicted of a criminal offence, the immigration officer will have to subject the eligibility to a reconsideration.[33] Also, if the immigration officer finds a claimant eligible and subsequently discovers that the finding and positive decision was based on misrepresentation and fraud, the immigration officer will have to reconsider such claimant`s eligibility.[34] To this extent the claimant will be notified and allowed to respond to the evidence of

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[29] S. 101(1)(b) and(c) of IRPA. This criterion strikes a chord as an incorporation of the principle of *res judicata* designed to eliminate the possibility of repeat claims. In this context, the prohibition of a second claim should be based on the facts that the first claim has the same facts and circumstances as the second or repeat claim. In essence, the prohibition would not apply where there has been a change in the facts of the claim or the second claim is been made on the basis of completely fresh circumstances.

[30] S. 101(1)(f) of IRPA.

[31] *Supra*, note 24. The only caveat to this is when there is a subsisting successful appeal against the removal order.

[32] This application however is not part of the Convention refugee determination process. It is designed to correct an error in procedure, law or excess of jurisdiction. If an error is eventually found to have been committed by the immigration officer, the claim will be sent back to the Refugee Division for re-determination. See D. Bagambiire, *Canadian Immigration and Refugee Law* (Aurora, Ontario: Canada Law Book Inc., 1996) at 245.

[33] S. 103(1) of IRPA.

[34] S. 104(1)(c) of IRPA.

fraud or misrepresentation. If the evidence shows that the claimant would have been found ineligible if not for his/her fraud and/or misrepresentation, the immigration officer will change the positive decision to a negative finding and notify the RPD. The RPD on the receipt of this notification from the immigration officer will terminate the consideration of the claimant`s application for refugee status in Canada. In the situation where the Refugee Protection Division has already arrived at a decision, presumably favourable to such a claimant, the decision becomes null and void.[35]

The burden of proof in eligibility determination before the immigration officer is a civil one which is dischargeable on the standard of balance or preponderance of probabilities and it rests with the party making the claim.[36] The IRPA is silent on whether a claimant is entitled to counsel in providing the information required by the immigration officer making the determination or, even broader still, in the general presentation of his or her claim to eligibility. In this respect the decision of the Supreme Court in the case of *Dehghani -v- Canada (Minister of Employment and Immigration)*[37] is instructive. The appellant was denied a right to counsel by the Supreme Court of Canada which held that a foreign national is not entitled to counsel at a secondary level examination at a port of entry. The Supreme Court came to this decision because the critical factor of detention within the

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[35] S. 104(2) of IRPA.

[36] S. 100(4) of IRPA.

[37] [1993] 1 S.C.R. 1053

parameters of section 10(b)[38] of the *Canadian Charter of Rights and Freedoms* was absent in the case.[39]

The right to counsel in the scenario of a person having his eligibility determined by an immigration officer should be a right of procedural justice founded on the principles of natural and fundamental justice especially given the implications of such a decision for an affected claimant in the context of his or her right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[40] Although the right to engage counsel is not *stricto senso* an absolute common law right encapsulated in the principle of *audi alteram partem*, (i.e. the right to fair hearing)[41], it is posited that the right to engage counsel at this level should not be denied a refugee claimant who seeks to have his or her claim heard by the Refugee Protection Division.[42]

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[38] Section 10(b) of the Charter provides; " Everyone has the right on arrest or detention... (b) to retain and instruct counsel without delay and to be informed of that right;".

[39] The facts of the case can be distinguished from the situation which will ordinarily arise when an immigration officer is determining whether a refugee claimant is eligible or not to have his or her claim referred to the Refugee Protection Division for hearing.

[40] S. 7 of the *Canadian Charter of Rights and Freedoms*.

[41] The concept of natural justice at common law is made up of the two maxims of (i) *nemo judex in causa sua* - the right to be heard by an unbiased decision-maker, and (ii) *audi alteram partem* - the right of fair hearing. See also, *Siloch -v- Canada (Minister of Employment & Immigration)* (1993), 18 Imm. L. R. (2nd) 239, 10 Admin. L.R. (2nd) 285 (F.C.A.).

[42] Iacobucci, J. in *Dehghani -v- Canada (Minister of Employment & Immigration)*, *supra* note 35 at 672 observed that; "While the right to counsel under s. 7 may apply in other cases besides those which are encompassed by s. 10(b), for example in cases involving the right to counsel at a hearing, it is clear from my earlier comments that the secondary examination of the appellant at a port of entry is not analogous to a hearing. *Certainly, factual situations which are closer or analogous to criminal proceedings will merit greater vigilance by the courts.*" (Emphasis supplied). Some scholars have argued rightly that given the fact that immigration officers, will in many cases be making determinations regarding both admissibility to Canada and eligibility to make a refugee claim, there must now be a right to counsel when the immigration officers make these determinations. See D. Galloway, *Immigration Law* (Concord, Ontario

The RPD may render a positive or negative decision depending on the available facts before it.[43] If there is a negative decision rendered by the RPD, in which case the claimant is not recognised as a Convention Refugee, and he or she feels that there is an extant risk on return to the country of origin, IRPA provides for a mechanism whereby the claimant may apply to the Minister for protection against a removal order that is in force.[44]

When a person is referred to the Refugee Protection Division of the Immigration and Refugee Board (IRB), the immigration officer may, as a matter of policy, issue a conditional departure order against that person. This order becomes absolute and effective only if the claimant withdraws or abandons the claim to be a Convention refugee, or is determined not to be a Convention refugee, or despite being a Convention refugee, does not have the right to remain in Canada.

2.3.1. Rights to Employment, Education and Health Services

Canada extends the right to apply for employment authorization to refugee claimants in certain circumstances.[45] In general, only those who could not subsist without public assistance are eligible

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: Irwin Law, 1997) at 218-9; and L. Waldman, *Immigration Law and Procedure* (Vol. 1)(Toronto : Butterworths, 1992) at 7.36.

[43] The post-determination developments in cases of positive decisions are addressed below in the description of the operation of the Refugee Protection Division of the Immigration and Refugee Board (IRB).

[44] S. 112(1) of IRPA states that: [a] person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

[45] S. 206 of the *Immigration and Refugee Protection Regulations (IRPR)*, SOR/2002-227. The restrictive nature of this right however raises the jurisprudential question of whether it is a right in *stricto sensu* or a mere privilege extended by Canadian state to this category of refugee claimants.

for this employment authorization.[46] For the claimant to secure this status, he must have completed a personal information form and submitted same to the Immigration and Refugee Board. The completion of a medical examination is also essential.

Refugee claimants and their children, are eligible to make application for student authorization in order to enable them have access to the available educational facilities in Canada while they await a decision on their claims.[47]

Citizenship and Immigration Canada (CIC) administers the Interim Federal Health Program for the purpose of making essential health services and emergency facilities available to refugee claimants who may be in need of such services. These services are also extended to those refugees who are already in Canada but are not yet covered, either in full or partially, by the various provincial health care regimes.[48]

2.3.2. Special Humanitarian Programs

It is a policy of the Canadian state to design special humanitarian programs as initiatives on a fluid and on-going basis in response to a diversity of situations around the world calling for international relief of a humanitarian and compassionate nature.[49] Under this scheme, persons who have been persecuted, displaced or compelled to flee their home countries because of natural or man-

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[46] *Supra*, note 45, s. 207.

[47] *Ibid.*

[48] *Supra*, note 22 at 7.

[49] It is on record that Canada accepts between 20,000 and 30,000 Convention refugees and other displaced persons annually. According to the 2000 Immigration Plan, Canada plans to accept between 22,100 to 29,300 refugees in 2000 and roughly half of these refugees were expected to be selected abroad for resettlement in Canada. See *supra*, note 22 at 2.

made disasters and who may not have ordinarily met the 1951 Convention criteria are given protection by the country.

The legislative authority for the implementation of these programs can be traced to the discretionary powers conferred on the Governor in Council and the Minister in charge of immigration to act as they deem fit in situations of massive flows of persons. In exercising this power the Governor in Council and the Minister are guided by the objective of the state policy which dictates the fulfilment of Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted.[50]

These special humanitarian programs characteristically extend privileges to those concerned. For instance, under the program removal proceedings against nationals of affected countries are usually suspended, outstanding removal orders are stayed, and employment authorisations are issued to nationals of such countries permitting them to engage in paid employment in Canada. Also, landing criteria are relaxed to allow those in Canada, together with their dependants, in or outside Canada, to become landed immigrants where they were able to demonstrate an ability to establish themselves in Canada or in some other cases where there were eligible persons willing and able to assist them in resettlement in Canada.[51]

There are a number of "designated classes" which are subsidiary programs under the generic special humanitarian program of Canada. Under these sub-programs, the nationals of countries who

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[50] S. 12(3) of IRPA, *supra*, note 12.

[51] D. Bagambiire, *supra*, note 32 at 242. Countries that have benefited from these programs in recent time include, Argentina, Chile, the former Republic of Czechoslovakia, Cyprus, Ethiopia, El Salvador, Guatemala, Hungary, Iran, Iraq, Italy, Kampuchea, Laos, Lebanon, Poland, Sri Lanka, Uruguay and Uganda, to mention a few.

measure up to some prescribed criteria are designated by the Governor in Council as a class of people whose admission would be consistent with Canada`s humanitarian tradition as far as displaced and persecuted persons are concerned.

Designated classes have included the self-exiled class, established in 1979 to permit the landing of citizens of the former Soviet Bloc, East European countries other than Yugoslavia, where the citizens were outside of their countries, unwilling or unable to return to those countries, and where Canadian citizens were willing to facilitate their settlement. This arrangement made it possible to admit persons who met the criteria as prescribed whether they satisfied the definition of a "Convention refugee" or not.[52] However, with the collapse of the Berlin wall in 1989 which signalled the end of the cold war and the attendant global geo-political changes, the program`s continued existence and relevance has come under serious challenges and criticisms. It is now restricted only to applicants who are determined eligible as of August 31, 1990.[53]

The Indo-Chinese Designated Class Program which applied to citizens of Kampuchea, Laos and Vietnam is another of such sub-programs under the special humanitarian program of Canada. It made citizens of the above mentioned countries eligible if they had left their countries as of April 30, 1975, had not settled elsewhere and had Canadian sponsors willing and qualified to sponsor their resettlement.[54]

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[52] *Self-Exiled Persons Class Regulations*, SOR/78-933. This sub-program was a policy initiative designed as an anti-communist propaganda to show the world that citizens of the countries recognised under the arrangement, i.e, countries in Eastern Europe which were formerly allied with the Soviet Union, were all necessarily in flight from persecution and ready to defect anytime.

[53] *Self-Exiled Persons Designated Class Regulations*, as amended by SOR/90-533.

[54] *Indochinese Designated Class Regulations*, SOR/78-932.

The Political Prisoners and Oppressed Persons Designated Class was the third category of the special humanitarian program.[55] This sub-program applied to citizens of Argentina, Chile and Uruguay which were countries specifically recognised in the1970s and 1980s for their human rights abuse notoriety. The objective of this sub-program was to permit the citizens of the identified countries to make claims for Convention refugee status within the borders of their countries at the Canadian posts located in their countries.[56] However, they have the burden of proving that they do fit within the gamut of the definition of a "Convention refugee" and further establish that they were in fear of persecution and needed protection.[57] This sub-program has been revised because of the wind of political change which has blown over Latin America and has been replaced by newer dispensations.[58]

2.3.2.(i) Refugee Selection Abroad

This is a modern policy initiative which replaces in content the sub-programs discussed above. Under it, the federal government of Canada with the active support of private sponsorships, such as incorporated organizations and groups of individuals, assist refugees and other persecuted people to

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[55] *Political Prisoners and Oppressed Persons Designated Class Regulations*, SOR/82-997, formerly known as *Latin American Designated Class Regulations*, SOR/78-932.

[56] The *Convention Relating to the Status of Refugees, 1951* and the domestic Act do not envisage this type of arrangement wherein protection is sought from inside the borders of a country.

[57] It is important to mention that there is a distinction in terms of the applicable procedure for this category of designated class and the applicants under the self-exiled persons class category which applies to the citizens of Eastern Europe, the former communist countries. The latter applicants needed only to be outside of their countries and intimate that they did not want to return to communism. See D.Bagambiire, *supra*, note 32 at 244.

[58] *Infra*. See the Source Country Class described below.

rebuild their lives in Canada.[59] The federal government provides income support for up to twelve months to those refugees it sponsors under this program. It additionally provides initial essential services which include meeting the refugee at the airport, temporary accommodation, if required, orientation and information, preliminary assessments and links to other applicable services such as language training.[60] Similarly, private sponsors commit to provide the sponsored refugee with basic assistance in the form of accommodation, clothing, food and settlement assistance for up to twelve months (and possibly up to 24 months in some exceptional cases).[61]

In order to be eligible for selection under this dispensation, an individual must be a Convention refugee seeking resettlement or a member of the Country of Asylum Class or Source Country Class. Individuals coming within the purview of the program must also demonstrate an ability to eventually re-establish their lives in the country and pass medical, security and criminality assessments.

A "Convention refugee seeking resettlement" is defined as any person who

- is a Convention Refugee,
- is outside Canada,
- is seeking admission to Canada for the purpose of resettling in Canada, and
- in respect of whom there is no possibility, within a reasonable period of time, of a durable solution.[62]

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[59] Annually, targets are set for this purpose. For example, the year 2000 target was 7,300 government-assisted refugees, while the range of 2,800 to 4,000 was prescribed for privately sponsored refugees.

[60] "CIC Canada / The Canadian Refugee System: Refugee Selection Abroad", *supra*, note 22 at 3.

[61] *Ibid.*

[62] *Supra*, note 22 at 3 of 4 - Appendix.

The Country of Asylum Class[63] includes those outside their country of citizenship or habitual residence who have been and continue to be seriously and personally affected by civil war or armed conflict or massive violations of human rights and for whom there is no possibility, within a reasonable period of time, of an alternative solution. Those individuals who are selected under this class must be privately sponsored or have adequate financial means to support themselves and their dependants unless they are special need refugees being sponsored under the Joint Assistance Sponsorship Program.[64]

The Source Country Class[65] applies to those residing in their country of citizenship or habitual residence for whom there is no possibility, within a reasonable period of time, of an alternative solution. This class includes those who have been and continue to be seriously and personally affected by civil war or armed conflict; those who have been detained or imprisoned as a result of exercising their right of freedom of expression, right of dissent or right to engage in trade union activity; and those who fear persecution for reasons of race, religion, nationality, membership in a

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[63] *Supra*, note 45, s. 147 of the *Immigration and Refugee Protection Regulations (IRPR)*, SOR/2002-227 of 11 June, 2002.

[64] *Supra*, note 22 at 1. The Joint Assistance Sponsorship (JAS) is a sponsorship undertaken by the Federal Government, (per financial assistance) and a private group, (per emotional assistance and mentoring) for special needs cases. This program enables organizations to assist in the settlement of disadvantaged persons who would have been otherwise considered as inadmissible. Such cases may include, victims of trauma or torture, persons with an unusual family size or configuration, persons who have been in refugee camps for extended periods and persons with certain medical problems which could have made them inadmissible. Joint sponsorships ordinarily are for a period of up to 24 months.

[65] S. 148 of IRPR, *supra*, note 45.

particular social group or political opinion.[66] The Source Country Class is made applicable only to nationals of countries that appear on a schedule which is revised on an on-going and regular basis.[67]

There is also the Canada-Quebec Accord which exclusively mandates Quebec to select all independent immigrants and refugees abroad in situations where the province is their destination. The individuals who are selected by the Province of Quebec receive a document called *Certificat de selection du Quebec* (CSQ) for purposes of admission into the province. The Federal Government however retains responsibility for the eligibility of refugees and ensures that statutory requirements[68] for admission are fulfilled before visas are issued.

2.3.2.(ii) Women at Risk Program (AWR)

This program is crafted by the Government of Canada after the United Nations High Commissioner for Refugees (UNHCR) program called "Assistance to Women at Risk".[69] It was formally established in February, 1988 and caters to refugee women seeking resettlement in Canada. The program is designed for applicants who can fulfil the eligibility conditions which include, being;

- outside Canada
- a Convention refugee seeking resettlement or a member of the Source Country Class or Country of Asylum Class; and
- a woman without the normal protection of a family unit who finds herself in a precarious situation whereby the local authorities cannot ensure safety for

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[66] *Supra*, note 22 at 2. Refer also, *Political Prisoners and Oppressed Persons Designated Class*, *supra*, note 55.

[67] For the period of June 29, 2001 to December 31, 2002, Colombia, Democratic Republic of the Congo (DRC), El Salvador, Guatemala, Sierra Leone and Sudan are the countries that are currently listed on the schedule.

[68] These include medical and criminal checks.

[69] This is the source of the Canadian acronym (AWR) being used for her similar program.

> her and any dependants. This includes women and/or their dependants who are experiencing significant difficulties, such as harassment by local authorities or by members of their own communities. Some women and their dependants may be in need of immediate protection, while others may be in permanently unstable circumstances.[70]

In most cases, the women are identified by the United Nations High Commissioner for Refugees and are referred to a Canadian Embassy overseas. In other situations, advocacy groups refer such women as are found by them to have no family or friends to whom they can turn for support and protection and who by virtue of such predicaments are extremely vulnerable to the threat of rape and other forms of violence to themselves or to any children they may have.[71]

2.4. The Quasi Judicial and Judicial Perspectives vis-s-vis Canadian Refugee Policy

The Canadian refugee policy is also veritably driven by certain specific objectives that have lucid nexus with the operations of the judicial arm of government.[72] Under section 3(2)(c) of the *Immigration and Refugee Protection Act*, one of the objectives of the statute is to grant, as a fundamental expression of Canada`s humanitarian ideals, fair consideration to those who come to Canada claiming persecution. Further, the new Act specifies that with respect to refugees, it has an

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[70] "CIC Canada / Canada`s Program for Women at Risk", *supra*, note 22 at 1. Since the commencement of the program, Canada has offered almost 1,100 women and their dependants a safe haven and opportunity for resettlement in the country.

[71] *Ibid.* There are several forms of resettlement assistance available for AWR cases. As appropriate, the case may be processed as government-assisted or as privately sponsored. In other cases, women at risk program requires a Joint Assistance Sponsorship in which case, the federal government and a private organization called a Sponsorship Agreement Holder (SAH) work together to ensure the woman receives the specialized assistance she may need.

[72] It should be observed that the Immigration and Refugee Board, which has a major role to play in this regard, is not a branch or organ of the judiciary in spite of the strikingly similar responsibilities and duties it has when compared with the regular courts. See further, sections 91, 92 and 96 of the *Constitution Act*, 1867.

objective of establishing fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings.[73]

Section 3(3)(c) stipulates as well that the statute is to be construed and applied in a manner that ensures that decisions taken under the Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination.[74]

2.4.1. The Quasi-Judicial Process

The quasi judicial process follows the completion of the function of the immigration officer. If the immigration officer determines that a person claiming Convention refugee protection is eligible, the claim proceeds to hearing by the Refugee Protection Division of the IRB.[75] Currently, this Division deals exclusively with the determination of claims for refugee status made within Canada. The members of the Refugee Protection Division are appointed to the Board by the Governor in Council, to hold office during good behaviour for a term not exceeding seven years, subject to

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[73] *Ibid*, section 3(2)(e).

[74] *Ibid*.

[75] Under the *Immigration and Refugee Protection Act* (IRPA), there are now four divisions, viz: the Refugee Protection Division, the Refugee Appeal Division, the Immigration Division and the Immigration Appeal Division. The *Immigration Act, 1976* provided for three divisions within the Immigration and Refugee Board (IRB) namely: the Convention Refugee Determination Division (CRDD), the Immigration Appeal Division (IAD) - (also referred to alternatively as Appeal Division), and the Adjudication Division.

removal by the Governor in Council at any time for cause, to serve in a regional or district office of the Board.[76]

The Division tries to provide a conducive environment for a Convention refugee claimant so as to enable him or her to present the case as comprehensively as possible with the back up assurance of the full protection of the *Canadian Charter of Rights and Freedoms*.[77] A claimant can either present the case personally or use the services of a counsel/agent and if necessary, have access to the services of an interpreter.[78] The presentation and acceptance of evidence before the IRB, in the exercise of its quasi-judicial powers, are not restricted by technical or legal rules of evidence.[79] This regime is extant with the sole purpose of eliciting all the relevant information to the claim. Pursuant

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[76] Section 153 (1)(a) of *IRPA*. Compares with s. 61 (1) of the *Immigration Act, 1976*.

[77] See generally, *Ali -v- Canada (Minister of Employment & Immigration)* (1993), 22 Imm. L. R. (2nd) 305 (F.C.T.D.); *Hagi-Mayow -v- Canada (Minister of Employment & Immigration)* (1994), 74 F.T.R.120 (TD) - Nadon, J.; and *Ashoornia -v- Canada (Minister of Employment & Immigration)* (1994) F.C.J. No. 375 - Simpson, J.

[78] See s. 167 (1) & (2) and the provisions of section 170 *(a)* - *(f)* of IRPA which provides, *inter alia*, that: " The Refugee Protection Division, in any proceeding before it, *(a)* may inquire into any matter that it considers relevant to establishing whether a claim is well-founded; *(b)* must hold a hearing; *(c)* must notify the person who is the subject of the proceeding and the Minister of the hearing; *(d)* must provide the Minister, on request, with the documents and information referred to in subsection 100(4); *(e)* must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations; *(f)* may, despite paragraph *(b)*, allow a claim for refugee protection without a hearing, if the Minister has not notified the Division, within the period set out in the rules of the Board, of the Minister`s intention to intervene;".

[79] Section 170 *(g)* and *(h)* of the *IRPA, 2001* provide that the Refugee Protection Division: "*(g)* is not bound by any legal or technical rules of evidence; *(h)* may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances;". See also the cases of *Pathmakanthan -v- Canada (Minister of Employment & Immigration)* (1994), 71 F.T.R. 154 (TD); and *Ahmed -v- Canada (Minister of Employment & Immigration)* (1994), 70 F.T.R. 111 (TD).

to this end, a Refugee Claim Officer normally assists the panel before and during the hearing by ensuring that all available evidence is presented.[80]

Refugee determination hearings are to be conducted as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.[81] Matters before the Refugee Protection Division shall be conducted before a single member unless the Chairperson is of the opinion that a panel of three members should be constituted.[82]

In order to protect the safety and privacy of the claimants and their family members, hearings usually take place *in camera.* The statute gives the IRB discretion to open the process up to the public in cases where there are specific application(s) from member(s) of the public. In the latter situation, the Refugee Protection Division may take whatever measures are necessary to ensure the confidentiality of the proceedings where there is a serious possibility that the life, liberty or security of any person would be endangered.[83]

The representative of the United Nations High Commissioner for Refugees may observe the hearing proceedings if they so desire.[84]

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[80] This is the inquisitorial nature of the hearing proceeding before the IRB. In practice, the hearing is generally via the physical presence of the claimant(s) before the tribunal but allowance has been made for hearing via video conference - s. 164 of the *IRPA, 2001*.

[81] S. 162 of the *IRPA, 2001*.

[82] S. 163 of the *IRPA, 2001*.

[83] S. 166 *(c)* and *(d)* of the *IRPA, 2001*.

[84] S. 166 *(e)* of *IRPA*. This arrangement reveals the transparency of the Canadian refugee claims assessment procedure. It is also a testimony to the efforts of the country to achieve its goal of reassuring the world community that Canada has an effective and humanitarian refugee determination process that is consistent with her international commitments.

The *Immigration and Refugee Protection Act* has introduced the Refugee Appeal Division[85] within the Immigration and Refugee Board to enhance fairness and consistency in decision-making. Section. 171 of the statute provides that:

> " In the case of a proceeding of the Refugee Appeal Division,
> (a) the Minister may, after giving notice within the period that is required by the rules, intervene in the appeal, including for the purpose of filing submissions;
> (b) the Division may take notice of any facts that may be judicially noticed and of any other generally recognized facts and any information or opinion that is within its specialized knowledge; and
> (c) a decision of a panel of three members of the Refugee Appeal Division has, for the Refugee Protection Division and for a panel of one member of the Refugee Appeal Division, the same precedential value as a decision of an appeal court has for a trial court."

The Refugee Appeal Division is expected to provide failed refugee claimants with the right to a paper appeal of a negative decision from the IRB. Currently, unsuccessful refugee applicants/claimants have the right to apply for judicial review to the Federal Court, Trial Division, after obtaining leave of the Federal Court. For those who are of the impression that they will be at risk if they return to their country of origin, there are provisions for a Pre- removal Risk Assessment before they are removed under the new Act.[86]

In a policy statement released by the Minister of Citizenship and Immigration, the implementation of the Refugee Appeal Division is being delayed because of the pressures on the system.[87] The

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[85] *Supra*, note 74.

[86] See sections 112-116 of *IRPA*.

[87] "News Release" of April 29, 2002. Available online: http://www.cic.gc.ca/english/press /02/0212-pre.html. Accessed on July 18, 2003.

Department intends to focus first on current challenges which include the implementation of other aspects of the Act while reducing the inventory and processing times for extant claims.

2.4.2. The Judicial Process

The process of implementation of the fair consideration objective and the goal of establishing fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, which drive in part the Canadian refugee policy,[88] continues in the Federal Court of Canada if a claimant has been denied refugee status by the administrative tribunals vested with the responsibility of determining the matter.[89] This position stems from the general supervisory jurisdiction which the superior courts have over administrative tribunals performing quasi-judicial functions.[90]

Although the driving objectives of the Canadian refugee policy which are enumerated in the *Immigration and Refugee Protection Act* are non-justiciable[91], both the quasi-judicial authorities and the superior courts use them as interpretative guidelines to arrive at just and fair decisions. The Refugee Protection Division and the Refugee Appeal Division have the duty to act fairly in the process of determining who is entitled to international protection of Canada as a Convention refugee. In this respect, if either of these administrative tribunals makes a decision which violates the principle

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[88] S.3(2)(c) & (e) of *IRPA*.

[89] I.e. the Refugee Protection Division and the Refugee Appeal Division.

[90] See, *Crevier -v- Attorney-General of Quebec* [1981] 2 S.C.R. 220 (Supreme Court of Canada) and *Anisminic Ltd. -v- The Foreign Compensation Commission* [1969] 2 A.C. 147 (H.L.).

[91] *Supra*, note 17.

of procedural justice[92], the courts have jurisdiction to set aside such an erroneous decision in the process of judicial review. Judicial review by the Federal Court with respect to a decision, determination or order made, a measure taken or a question raised under the *Immigration and Refugee Protection Act* is commenced by making an application for leave to the court.[93] No appeal lies from the decision of the Federal Court - Trial Division with respect to the application for leave.[94] However, the judicial review by the Federal Court - Trial Division is subject to an appeal to the Federal Court of Appeal which can only be made if, in rendering the judgment, the judge certifies that a serious question of general importance is involved and states the question.[95] If either of the parties, i.e. the Convention refugee claimant or the Minister, still remains unsatisfied by the Federal Court of Appeal's decision, the Supreme Court of Canada stands as the last bastion within the Canadian legal system.

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[92] *Supra*, note 41. This in essence consists of the common law principles of "natural justice" and "fairness" as developed by superior court jurisprudence.

[93] Section 72 (1) of the *IRPA, 2001*. See also, s. 18(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7. In the event of any inconsistency between the *IRPA, 2001* and the *Federal Court Act*, the provisions of the *IRPA, 2001* prevails - [s. 75(2) of the *IRPA, 2001*].

[94] Section 72(2)(e) of the *IRPA, 2001*.

[95] S. 74 (d) of the *IRPA, 2001*.

CHAPTER THREE

ARMED CONFLICTS AND CANADIAN REFUGEE LAW

This chapter is premised on the thesis that the Convention definition of a refugee which omits civilian non-combatants who are victims of civil war situations is inadequate. It is this definition that Canadian refugee law administers. It is contended that the regional models prescribed in the Organisation of African Unity Convention, the Organisation of American States' Declaration and the Asian African Legal Consultative Organisation's Resolution as described earlier in Chapter One are preferable and should be adopted.

3.1. The General Nature of Armed Conflicts

International armed conflicts and non-international armed conflicts have great capacities to generate refugee producing situations. These conflicts start for many reasons, some of which are enumerated in the 1951 *Convention Relating to the Status of Refugees*.[1] Many armed conflicts commence, particularly in Africa and Eastern Europe, for reasons of racial/ethnic or religious differences. One of the most notable features of many armed conflict situations is the diversified facets of the danger with which they confront the populace of the affected geographical area. There is the natural consequence of widespread dislocation and perilous hardships which a controlled pursuit of military objectives engenders. Alongside this are the effects, on both the civilian population and the combatants, of random acts of violence which result in a serious general deterioration of the social, economic and physical conditions of a country. A commentator sums up the scenario this way:

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[1] The 1951 Convention, *supra*, chapter one, note 6.

> " Intensive fighting can lead to widespread and indiscriminate death and destruction; and combatants forces, hardened or brutalized by the savageries of war, can inflict severe suffering on the civilian population. The social order can collapse to the point where anarchy exists and even basic rights and freedoms cannot be protected. Instead of one central authority in effective control of a country, two or more local *de facto* authorities can exist, perhaps each exercising only partial control over an uncertain area of territory. An economic collapse and a general deterioration in the physical environment can lead rapidly to widespread famine, drought and disease."[2]

Victims of this kind of situation are consequently compelled to leave their villages, towns and cities in search of refuge and help either within their countries or outside the borders of their countries. It is on record that the Second World War displaced some thirty million people in Europe alone. In 1971 as a result of armed conflict that followed the havoc caused by floods and a cyclone, some ten million refugees entered India from Bangladesh. Within a period of one month of an outbreak of conflict in the month of March of the same year, more than 1,200,000 refugees had entered India. Four months later, the Indian government averred that 8,320,000 persons had entered India. In December of the same year, the figure was increased to ten million, indicating that there was a monthly influx rate of one million people.[3]

In 1948, nearly a million people left Palestine in a matter of weeks in the course of the conflict which led to the emergence of the new State of Israel. Hundreds of thousands were displaced in a matter of days during the war in the same region which broke out about twenty years later.

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[2] G.J.L. Coles, *The Question of a General Approach to the Problem of Refugees from Situations of Armed Conflict and Serious Internal Disturbance* (Villa Nobel, Sanremo : International Institute of Humanitarian Law, 1992) at 13.

[3] *Supra*, at 16. Earlier, in 1947, the partition of the Indian sub-continent had resulted in a two-way flight of eighteen million Hindus from Pakistan and Muslims from India.

As a result of deteriorated conditions in Kampuchea subsequent to many years of conflict which had initially led to mass executions and the general displacement of the entire populations of urban areas, about 350,000 persons were compelled to seek refuge in Thailand in 1979 fleeing many factors including physical danger which resulted from the conduct of war, famine, drought, disease and extreme physical hardships.

Shortly after April 1979, approximately 60,000 refugees from Afghanistan sought refuge in Pakistani territory, and this influx increased gradually reaching the figure of 400,000 officially registered refugees at the end of 1979, 932,000 by the end of June, 1980 and 1,100,000 by the end of September, 1980. Two years later, the number of Afghan refugees in neighbouring countries exceeded three million - an annual influx rate of over one million people, over a three-year period.[4]

In the period between May to August, 1988, some three hundred thousand (300,000) persons crossed the frontiers between Somalia and Ethiopia in search of refuge.[5]

The stories are similar, the experience and consequences are all but familiar to victims of armed conflict situations whether international or non-international in character.

This thesis however intends to delimit its scope to the non-international armed conflicts which are often referred to alternatively as internal armed conflicts, armed national conflicts or civil war situations.[6]

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[4] *Supra*, note 2, at 17. In the months to follow, the number further peaked at five million.

[5] *Ibid.*

[6] In this respect, the *Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 75 U.N.T.S. 287 (*supra*, chapter one, note 16) - known as the Fourth Geneva Convention - is most relevant as it is notable for its exclusive regulation of the treatment of civilians in time of war. The events of World War II had revealed the disastrous consequences of the absence of a Convention for the protection of civilians in wartime. This Convention specifically takes account of the experiences of that war. The Convention has a short part of it - (Part II) - dealing with the general protection of populations against certain consequences

This chapter examines aspects of the Convention refugee definition that impact on, and effectively limit, the ability of civil war non-combatants to qualify for its protection by considering the following sub-themes seriatim: (i) alienage; (ii) the phrase "well-founded fear of persecution" and (iii) the nexus issue, i.e. the link of the suffering or persecution to one of the listed Convention grounds.

Under this statute, refugee protection is conferred in the following ways. First, it is conferred when a person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons.[7] Second, refugee protection is conferred on a person when the Board determines the person to be a Convention refugee or a person in need of protection[8] and finally, refugee protection can be conferred when the Minister allows an application for protection, except in the case of a person described in subsection 112(3) of *IRPA*.[9]

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of war leaving aside the problem of the limitation of the use of weapons. A more significant portion of the Convention deals with civilians in enemy territory and in occupied territory. Worthy of mention is Article 44 of the Convention which categorically addresses refugees by providing that: " In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government". Of equal significance is the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Protocol II*, (*supra*, chapter one, note 68) opened for signature Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I, II, 1977, reprinted in 16 I.L.M. 1442.

[7] Section 95(1)(a) of the *IRPA*), *supra*, chapter one, note 2.

[8] S. 95(1)(b) of the *IRPA*.

[9] S. 95(1)(c) of the *IRPA*. The discretion of the Minister, cannot be extended to any person who (a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality; (b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; (c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or (d) is named in certificate referred to in subsection 77 (1).

Section 96 of the *IRPA* incorporates the Convention definition into Canadian law:

> " A Convention refugee is a person who, by reason of a *well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion*,
>
> (a) *is outside each of their countries of nationality* and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
>
> (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country".[10]

3.2. Alienage

Under the 1951 Convention and the *Immigration and Refugee Protection Act*, it is mandatory for a claimant to be outside his or her country of nationality. This criterion contextually refers to "citizenship" and categorically to persons who have a nationality, as distinct from stateless persons.[11] The reality of the situation however is that a considerable number of persons forced to flee their homes in search of safety remain within the territorial jurisdiction of their home country. This is the

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[10] This is the definition existing in the 1951 Convention but which has been incorporated to Canadian domestic law in a slightly re-worded form. Emphasis supplied to highlight the subsequent themes for discussion.

[11] In the case of stateless persons, it is the country of former habitual residence that will be taken into account. See s. 96(b) of the *IRPA*.

classic position in Africa and some other parts of the developing world.[12] These people are regarded as internal refugees and consequently excluded from the scope of global protection.[13]

Several reasons were advanced for the exclusion of this category of persons who, other than for reasons of their inability to cross borders, deserve some element of protection. From an historical perspective, the 1951 Convention was drafted in the context of limited international resources without any intention of relieving the suffering of all involuntary migrants. In that respect, internal refugee displacement was considered to be of a different character which would turn out to demand the commitment of more resources than was available to the international community.[14]

Secondly, there was[15], and still is, the fear amongst the rich and developed countries that the inclusion of internal refugees in the international protection regime will encourage some States, especially those poorer nations which are comparably less developed , to transfer their responsibilities for the well being of their citizens to the world community. In order to encourage a good number

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[12] P. Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum" (1986), 60 Australian L.J. 148 at 149.

[13] See, *United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status*, p. 21 (1979). It stipulates that - "It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule".

[14] J.C. Hathaway, *supra,* chapter one, note 3 at 30.

[15] During the debate at the Conference preceding the Convention, Mr Henkin of the U.S.A. stated that: "While, in principle, it favoured the elimination of all exceptions, the United States Government wanted to maintain that of refugees of German ethnic origin residing in Germany because it considered that group of nearly eight million persons as normally under the jurisdiction of the German Government and it did not want to encourage that government to renounce all responsibility toward them by placing them under international protection" - see, U.N. Doc. E/AC.32/SR.5, at 5, January 30, 1950.

of the rich States to sign on to the Convention, it became necessary to assure them that they will not expend their finances on this category of people.[16]

Third, respect for the sovereignty of State members experiencing civil conflict constituted the most fundamental and critical rationale that made the Convention exclude internal refugees from its operational scope/gamut. However, it should be mentioned that the contemporary understanding of the scope of human rights on the international plane has broadened the authority of the international community. In this respect, it is not an unusual event to see the international community intervene in recent times in the affairs of sovereign States that are abusing the human rights of their citizens and tentatively protect such citizens as internal refugees.

Armed national conflicts most often produce refugee-like situations which force people to flee for safety. Such conflicts could have started on the basis of reasons that have nexus with the 1951 Convention refugee grounds, i.e. race, religion, nationality[17], membership of social group or political opinion. For example, the Hutus and the Tutsis in Rwanda have been at each others' throats for quite a while in the struggle for political dominance. This scenario is very typical in Africa where ethnic groups are countless. The origin of the civil strife in Sierra Leone is not distant from rivalries founded on grounds that are admixtures of race, religion, membership of social group or political opinions. Liberia`s internal armed conflicts have these grounds in an intertwined manner as seminal to the anarchy in the country. The East African countries of Ethiopia, Somalia and Sudan have comparable ordeals engineered by conflicts that are rooted in similar bases of disagreements. The

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[16] Hathaway, *supra*, note 14 at 30-31.

[17] The term "nationality" also refers to membership of an ethnic or linguistic group and may occasionally overlap with the term "race". See, *supra*, note 13.

central African State of the Congo, (which has altered its republican name back and forth)[18] has experienced plight in like manner with its sister African States and is currently suffering another bout of such internal conflict based on mutual ethnic suspicions. These situations make people want to escape from such troubled countries because the conflicts are directed at them practically whether they find themselves on the side of the ruling ethnic group or opposition ethnic group. This is the dilemma oftentimes with African conflicts.

Other parts of the world also have their share of the troubles and conflicts rooted in Convention related grounds. In Sri Lanka, the Tamils are busy fighting an internal armed conflict of liberation. The cause of this war could be linked right away with the Convention grounds of race, nationality, membership in a particular social group or political opinion. In Lebanon, religious conflict is known to have degenerated to an extent that citizens found themselves in the grips of an internal struggle that made continued existence within the borders of the State a miserable reality. There are many more such examples.

The requirement of alienage has generally limited the scope of those who can enjoy refugee protection as a part of the international community. A considerable number of the non-combatants trapped in these internal conflicts do not have the necessary financial and at times physical wherewithal to go beyond the territorial borders of the State at war. The most vulnerable victims like women and children are handicapped, in the African scenario particularly. These are countries that are economically non-viable to start with. The social-cultural configuration in these nations is such that it puts women and their children in a disadvantaged position in terms of economic empowerment.

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[18] The State was changed from the Republic of the Congo to become known as "Zaire" under the dictatorial clasp of President Mobutu Sese-seko Kukugbendu Wazabanga before it mutated again into the Democratic Republic of the Congo.

It thus becomes a herculean task for such victims to even manage their ways to the borders of the country. This is not to talk of the usually dilapidated infrastructures in most African States that make travelling a virtual impossibility. Roads are in disarray, bridges linking villages in some cases are cut off and the people may have to wade the waters as human canoes to cross from one village to the other before reaching the border to the neighbouring country, that is if the border itself is not policed by unsympathetic troops which is made up of soldiers from the rival ethnic group.

There is no doubt that this kind of scenario, where there is a strict insistence on territorial criterion that a claimant should be outside his country of nationality, will generate the question, whether there is not a disconnect between the requirement of alienage and the human suffering that internal armed conflict situations create for their victims which inevitably force these victims into involuntary migration. The exclusion of internal refugees by this requirement of alienage is unfair, especially for non-combatants. The criterion is insensitive to the social, legal and economic barriers which make it impractical for all to escape to international protection. Using this criterion, a reversed result is achieved in that paradoxically those who ultimately benefit from international protection are the originators and perpetrators of the armed conflict situation who are in positions of privilege as opposed to the intended targets of the Convention who are persons in need of protection. In the situation of internal armed conflict, the innocent children and their mothers who are victims of civil war situations and who are comparably less privileged should be the ultimate beneficiaries of international protection and not the warlords who are seminal to the national conflicts.[19] Hathaway observes further, and rightly so, that the Convention definition of refugee

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[19] A. Zolberg, "The Formation of New States as a Refugee-Generating Process" (1983), 467 *The Annals Am. Academy Pol. Soc. Science* 24, at 27.

status responds in a less than even-handed way to the protection needs of persons at risk of persecution if it insists that such a potential victim should be outside his country of nationality before he can become eligible for international protection.[20] The reality is that in most situations a putative and deserving refugee will be denied the opportunity of being considered for international protection simply on the basis of this territorial criterion considered a *sine qua non* by the 1951 Convention.

It is suggested that the international community intervene in critical and exceptional situations as a collective unit under the auspices of the United Nations. The international community can take this initiative to protect citizens within the territorial integrity of a sovereign State where there is evidence of "organised persecution involving mass executions; exploitation as human shields; rape; mass expulsions; burning and looting of homes and villages; destruction of crops and livestock; suppression of identity, origins and property ownership by confiscation of documents; hunger, starvation and exhaustion; and many other abuses of human rights and international norms of civilised behaviour."[21] This is the precedent laid down in the Kosovo Conflict where the majority ethnic Albanians, who had enjoyed a high degree of regional autonomy within the former Yugoslavia, were brought under the direct control of Belgrade in 1989 by Serbian leader Slobodan Milosevic, sparking opposition and eventual conflict in the country. By the beginning of April 1999, the United Nations High Commissioner for Refugees estimated that the campaign of ethnic cleansing had resulted in 226,000 refugees in Albania, 125,000 in the former Yugoslav Republic of Macedonia and 33,000 in

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[20] Hathaway, *supra*, note 14 at 29-30. See also, H. Adelman, "Refuge or Asylum - A Philosophical Perspective" (1988), 1(1) *J. Refugee Studies* 7 at 9.

[21] See "NATO & Kosovo : Historical Overview"-Available online : http://www.nato.int/kosovo/history.htm Accessed on July 18, 2003.

Montenegro.[22] The monumental proportion of the resulting crisis activated the intervention of the North Atlantic Treaty Organisation (NATO) as a regional arrangement[23] acting in concert with the United Nations to confront what is aptly classifiable as "threat to peace, breaches of the peace, and acts of aggression" endangering international peace and security.[24]

In a number of cases, claims for refugee status based on civil war situations are made in Canada by persons who are already in the country before the internal armed conflict broke out in the country of nationality or habitual residence. This kind of application is referred to as *sur place* refugee claim.[25] Under the 1951 Convention, there is no distinction between persons who flee their country in order to avoid the prospect of persecution and those who, while abroad, determine that they cannot or will not return by reason of the risk of persecution in their state of nationality or origin. Legal analysts have come to the conclusion that by virtue of the Convention's requirement in Art. 1(A)(2), that the claimant " is outside the country of his nationality . . .", refugees *sur place* are given protection on an equal footing with those who cross a border after the risk of persecution is already apparent.[26] This category is so recognised because it accords with the territorial requirement of alienage since

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[22] *Ibid.* The figures escalated such that by the end of May, 1999 over 1.5 million people (i.e. over 90% of the population of Kosovo, had been expelled from their homes.

[23] See, the *Charter of the United Nations*, Chapter VIII.

[24] *Op. cit.*, *Charter of the United Nations*, Chapter VII.

[25] U.N.H.C.R., Handbook on Procedures, *supra*, note 13 at 22, reads; "A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee '*sur place*' ."

[26] Hathaway, *supra*, note 14 at 33.

the refugee claimant is either already present or just arriving the foreign State and is thus able to claim benefit from protection against return.[27]

In most cases of *sur place* refugee claims, the claimant would have departed from his country for reasons quite unrelated to the one he is now basing his claim for refugee status on. He could have left his country with the intention to go on vacation, study or transact business abroad and thereafter return home. While on this mission, there could have been a significant change of events subsequent to his departure in his home State. If the circumstances resulting from this change of situations back in his home country would put him at risk of serious harm upon return, he may become eligible for international protection as a Convention refugee.[28] A claim of refugee *sur place* may also arise where there has been an intensification of pre-existing factors since the departure of the claimant from his country of nationality or habitual residence in case of stateless persons. This case is distinctive from the classical *sur place* refugee claim in the sense that, although the claimant may have been aware of the disturbing events at home even before his departure, there is new evidence to show that the situation has further escalated or degenerated to a worse position since his departure. If this post-departure escalation is sufficient to give rise to a reasonable risk of persecution

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[27] This view also finds support in the intention of the drafters of the Convention at its preparatory stage. For instance, Mr. Rain of France stated that the definition extended to " not only those who had actually left their country owing to persecution, but also those who had already been outside their country before the persecution began and were unable to return for fear of persecution" - see U.N. Doc. E/AC.32/SR.17, at 3, February 6, 1950.

[28] *Ghazizadeh -v- Minister of Employment and Immigration* (1993) 154 N.R. 236 (FCA); *Chaudri -v- Minister of Employment and Immigration* (1986) 69 N.R. 114 (F.C.A.). See also, A. Fragomen, "The Refugee : A Problem of Definition" (1970), *3 Case Western Reserve J. Int'l. L.* 45 at 55 ; and, G. Gilbert, " Right of Asylum : A Change of Direction " (1983), *32 I.C.L.Q.* 633 at 646.

upon return, he will be entitled to claim protection under the Convention definition. A considerable number of cases have been decided in Canada which uphold this concept.[29]

3.3. Well-Founded Fear of Persecution

The general conception of the connotations of the phrase "well-founded" is that it entails two requirements which have been captured in the following words by a legal scholar:

> "The first criterion is that the refugee claimant perceive herself to stand in 'terror of persecution'; her very personal response to the prospect of return to her home country must be an extreme form of anxiety that is neither feigned nor overstated, but is rather sincere and reasonable. Second, the subjective perception of risk must be consistent with available information on conditions in the state of origin, as only those persons whose fear is reasonable can be said to stand in need of international protection."[30]

This conception however places undue importance on the applicant's state of mind. It is submitted that the concept of well-founded fear is intended to restrict the scope of protection to those persons who are able to demonstrate a present or prospective risk of persecution, irrespective of the extent of mistreatment that they have experienced in the past.[31] In *Yusuf -v- Canada (Minister of Employment and Immigration)*,[32] the Court of Appeal rightly found it doubtful that a claim could be rejected because of the absence of a subjective fear in the presence of an objective basis for fear. The

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[29] *Yusuf -v- Minister of Employment and Immigration* (1995) 179 N.R. 11 (FCA), leave to appeal refused (1995), 191 N.R. 399 (note) (S.C.C.); *Ofori -v- Minister of Employment and Immigration* (1995) 92 F.T.R. 62 (F.C.T.D.); *Rahman -v- Minister of Employment and Immigration* (F.C.A. A-398-92, March 3, 1995); *Villalta -v- Minister of Employment and Immigration* (1993) 68 F.T.R. 304 (F.C.T.D.); *Penate -v- Minister of Employment and Immigration* (1993) 71 F.T.R. 171 (F.C.T.D.).

[30] Hathaway, *supra*, note 14 at 65 - (footnotes omitted).

[31] *Ibid.*

[32] [1992] 1 F.C. 629 (F.C.A.).

Court found it difficult to imagine in what circumstances it could be said that a person claiming refugee status could be right in fearing persecution, and still be rejected because it is said that fear does not actually exist in his or her conscious mind.

In essence, there must be a meeting of the subjective fear with the objective fear for a claim to succeed. This was the gravamen of the Supreme Court of Canada decision in *Chan -v- Canada (Minister of Employment and Immigration)*,[33] where it was held that a refugee claimant cannot establish a well-founded fear of persecution simply by alleging the existence of that fear. In order to meet the subjective aspect of the test for a well-founded fear of persecution, the claimant must establish to the satisfaction of the adjudicator facts that the alleged fear exists in his or her mind.

Canadian law is settled in the position that insofar as there is objective evidence to show that there is a reasonable possibility or chance of relevant persecution in the claimant`s State of origin, the claim should be adjudged well-founded.[34] The test/standard of "well-founded fear" was laid down by the Federal Court of Appeal in *Adjei -v- Canada (Minister of Employment and Immigration)*[35] to the effect that a probability of persecution is not required. It was stated that although the applicant has to establish his case on a preponderance of probabilities, he does not have to prove that persecution would be more likely than not.[36] The Court held that the proper test for determining a well-founded fear of persecution is whether there is a reasonable chance (or good grounds) that persecution would

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[33] [1995] 3 S.C.R. 593 (S.C.C.).

[34] Hathaway, *supra*, note 14 at 79.

[35] [1989] 2 F.C. 680, 7 Imm. L.R. (2d) 169.

[36] [1989] 2 F.C. 680 at 684.

take place were the applicant returned to the country of origin.[37] On the one hand, there need not be more than a 50% chance that persecution will occur (i.e., a probability). On the other hand, there must be more than a minimal possibility of persecution. In effect, this standard can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a "mere possibility". This "reasonable possibility" test in itself remains contentious because the risk of persecution will never be definitively measurable. It will be sufficient, if the evidence as a whole discloses a risk of persecution which would cause a reasonable person in the claimant`s circumstances to reject as inadequate whatever protection his State of origin is able and willing to afford him.[38]

Internal armed conflicts or civil wars have the tendency to generate what can be regarded as a generalized state of violence, oppression or persecution. This is logically so because once a national armed conflict commences, it does not usually discriminate or single out individuals as specific targets. Nothing can be stronger as an evidence of what a refugee claimant fears in this state of generalized violence than the testimony of persons who are similarly situated in the putative refugee`s position, especially when there is no direct evidence of the claimant having experienced individual persecution or suffered any harm in the recent past. This was the bane of the "particularized evidence rule". This rule as it was applied by decision-makers and the courts paid more attention to the personalization of issues instead of assessing on an objective basis the individual claim of the applicant. The claim should be at all times the focus and not the personality of the claimant.[39] In this respect, it is simply logical that a comparison of the claimant`s response to the apprehended risk with

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[37] *Ibid.* at 691.

[38] Hathaway, *supra*, note 14 at 80.

[39] *Inzunza -v- Canada (Minister of Employment and Immigration)*, (1979)103 D.L.R. (3rd) 105.

the response of others similarly situated will be a better indicator as to whether the fear is well founded or not.[40]

The logical inconsistency of the particularized evidence rule was also identified from both humanitarian and human rights perspectives by scholars who are of the opinion that many 'extremely heinous violations of human rights, including genocide, are by their very nature aimed at groups rather than individuals'.[41] Consequently, they rightly concluded that the particularized evidence rule would end up marginalizing the scope of refugee law and scuttle in the process the intentions of the drafters of the 1951 Convention.[42] This contention is bolstered by the historical fact that the 1951 Convention was designed to protect persons within large groups whose fear of persecution is generalized, i.e. the many displaced victims of the Second World War and the ideological dissidents from Eastern Europe.[43]

The test for persecution in a civil war situation for purposes of Canadian jurisprudence has now shifted to what is depicted as a "non-comparative approach". In *Ali -v- Canada (Minister of Citizenship and Immigration)*,[44] the Federal Court of Appeal agreed with the proposition that the non-comparative approach does not place an emphasis on comparing the level of risk of persecution

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[40] L. Wildes, "The Dilemma of the Refugee: His Standard for Relief" (1983) 4 *Cardoza L. Rev.* 353 at 372, where the author commented, *inter alia*, that ". . . the alien should only be required to show a valid fear of generalized persecution, and not necessarily a fear of persecution which would be levelled at the alien as an individual".

[41] Hathaway, *supra*, note 14 at 96.

[42] T. Cox, "Well-Founded Fear of Being Persecuted: The Sources and Application of a Criterion of Refugee Status" (1984) 10 *Brooklyn J. Intl L.* 333 at 350.

[43] Per Mr. Henkin of the U.S.A., U.N. Doc. E/AC.32/SR.3 at10, January 26, 1950.

[44] [1999] F.C.J. No. 63, (Stone, Strayer and Decary, JJ.), online: QL (FCA).

between the claimant and other individuals (including individuals in the claimant`s own group) or other groups. Instead, the claimant`s particular situation should be examined and that of his or her group in a manner similar to any other claim for Convention refugee status. The issue is not a comparison between the claimant`s risk and the risk faced by other individuals or groups at risk for a Convention reason, but whether the claimant`s risk is a risk of sufficiently serious harm and is linked to a Convention reason as opposed to the general, indiscriminate consequences of civil war. A claimant should not be labelled as a "general victim" of civil war without full analysis of her personal circumstances and that of any group to which she may belong. In this respect, using a non-comparative approach results in a focussing of attention on whether the claimant`s fear of persecution is by reason of a Convention ground.

Thus, if during the course of a national armed conflict, there is a general apprehension of fear of persecution and the government of the home State decided to shield only members of a particular religion, ethno-social group or political group, the exclusion of the other group(s) based on their civil or political status will support a claim of any individual member of the excluded group, regardless of the fact that many people are similarly affected. In the words of a renowned jurist, Atle Grahl-Madsen, "[o]nce a person is subjected to a measure of such gravity that we consider it 'persecution', that person is 'persecuted' in the sense of the Convention, irrespective of how many others are subjected to the same or similar measures."[45]

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[45] I.A. Grahl-Madsen, *The Status of Refugees in International Law* (Leyden : A.W. Sijthoff, 1966) at 213.

3.4. Nexus to Civil or Political Status

"Is the harm feared as a result of the targeting of the claimant or her group on the basis of any one, or a combination, of the grounds in the definition of Convention refugee ?"[46]

The discussion here is focussed, first, on those who are direct victims of armed conflicts and violence and, secondly, those claiming persecution on analogous grounds such as refusal to participate in military service necessitated by an on-going armed conflict.

3.4.1. Victims of Armed Conflict

It is a paradox that the 1951 Convention which was engineered by a conflict psychology will deprive victims of war and violence eligibility to refugee status claim. In other words, victims of armed conflicts are not regarded as refugees unless they can establish some Convention grounds which make them eligible only because they have either been discriminated against or victimized and persecuted based on their civil or political status in the home country. It is therefore imperative under Canadian law that for a victim of armed conflict to become eligible for international protection as a refugee, he must establish that his flight from the situation has a link or connection with a fear of harm which is directed at his civil or political status. Mere sympathy for the traumas of victims of war or armed conflict is secondary, if not irrelevant, to the whole process of determining refugee status.[47] An extensive array of decided cases shows that this definition is entrenched in Canadian

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[46] See The Guidelines, "Civilian Non-Combatants Fearing Persecution in Civil War Situations" - available online at: http://www.cisr.gc.ca/legal/guidline/civilian/cw_a_e.stm , accessed on July 20, 2003 were issued pursuant to section 65(3) of the Immigration Act, 1976 on March 7, 1996.

[47] In *Rizkallah -v- Canada (Minister of Employment and Immigration)*, F.C.A. A-606-90, May 6, 1992), the Federal Court of Appeal held that for a refugee claim to succeed, the claimant must establish a link between himself and persecution for a Convention reason. The Court dismissed Rizkallah's appeal for lack of evidence showing that Christians in his Lebanese village were collectively targeted in some way different from the general victims of the tragic and many-sided civil war.

jurisprudence. In *Darwich -v- Canada (Minister of Manpower and Immigration)*[48] the Federal Court of Appeal held that a person who flees civil war does not flee his country by reason of persecution. This clearly shows that civil war cannot be confused with persecution as envisaged by the 1951 Convention. Also, in *Barisic -v- Canada (Minister of Citizenship and Immigration)*,[49] the claimant, a Croatian citizen, was living in Zintic until the Serbian army chased all the Croats out. Thereafter he was living in areas safe for ethnic Croats. He feared that he would be persecuted by the Serbs if he returned home. Documentary evidence indicated the Serbs had been responsible for many atrocities against the Croats, but that Croats had also committed acts just as atrocious. The Trial Division held that it was not unreasonable for the Immigration and Refugee Board to have concluded that the claimant, like all Croats, was merely a victim of a civil war.[50]

In *Abdi -v- Canada (Minister of Citizenship and Immigration)*,[51] the claimant was a member of a Somali family, of the Darod clan. The Darod clan was associated with the ousted Siad Barre regime. The rebels of the United Somali Congress ("USC"), which had established control in Mogadishu, where the claimant lived, were members of the Hawiye clan and were identifying and killing members of the Darod clan. The claimant`s family had been victimized by members of the USC. This victimization included the arrest and disappearance of the claimant`s son in law, the murder of a young grandchild and the threat to murder a newborn grandchild while its mother (the claimant`s daughter) was in labour. The IRB determined that the claimant was not a refugee, because the fear

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[48] [1979] 25 N.R. 462 (FCA).

[49] (1995) 95 F.T.R. 69 (F.C.T.D.).

[50] *Ibid.* at 78.

[51] (F.C.A. A-602-94, June 10, 1997).

she felt was the same fear felt by all citizens of Somalia as a consequence of a civil war characterized by inter-clan murder, random violence and lawlessness. Thus, members of all clans were persecuted indiscriminately. The Trial Division agreed, noting that, while a state of civil war is not a bar to a refugee claim, the fear felt must not be that felt indiscriminately by all citizens as a consequence of the civil war, but rather a fear felt by the claimant himself or herself, by a group with which he or she is associated, or by all citizens on account of a risk of persecution based on a Convention ground. Thus, the Trial Division concluded that the Board was reasonable in its conclusion that the claimant, by reason of her membership in the Darod tribe, would not be in a position different from that of all Somalis. The Federal Court of Appeal upheld, by a majority decision, the verdicts of the Trial Division and the IRB.[52]

In *Khalib -v- Canada (Minister of Employment and Immigration)*,[53] the claimants were an Issaq family from Somalia. They feared returning because of the massive number of remaining land mines which the former government had placed indiscriminately in the roads and fields in the Hargesia area where the majority of Isaaqs reside. The Immigration and Refugee Board was not persuaded that any danger the claimants might face if they were to return to Somalia was related to one of the grounds provided in the definition of Convention refugee. Rather, that danger was one faced indiscriminately by all people in the Hargesia area. It was true that members of the Issaq clan are concentrated there, but those facts did not, in the Court`s view, render the IRB decision unreasonable or capricious, as the same danger was faced by all (i.e. Isaaqs and others) in the same region.

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[52] *Ibid.* at p. 9.

[53] (1994) 76 F.T.R. 67 (F.C.T.D.).

The Federal Court -Trial Division arrived at a similar decision in *Ratnavadivel -v- Canada (Minister of Employment and Immigration)*,[54] where the claimant was a Tamil from Sri-Lanka. From the age of thirteen until he left Sri-Lanka he endured a series of discriminatory acts, encounters with the Sri-Lankan authorities, beatings and incarcerations. His claim was rejected by the Immigration and Refugee Board on the grounds that he had not been targeted as a Tamil in the context of the civil war in the north of Sri-Lanka. The Trial Division held that based on the evidence before it, the decision of the Board could not be said to have been perverse or capricious.

However, the judiciary remains sensitive to the peculiarity of the facts of each case coming before it for determination. To this extent it is poised to find eligibility to refugee status where claimants from civil war situations can demonstrate linkage to Convention ground(s). In *Osman -v- Canada (Minister of Citizenship and Immigration)*,[55] the claimant who was a Hawiye woman from Somalia had married a man of the Darod (Marehan) clan and had borne him children. She had fled Hargesia after her husband had been killed in shelling. She feared returning to Somalia, because the militia of the Hawiye clan was in control in Hargesia and she feared persecution, because of her marriage to a man in a rival clan. The court noted that it is not appropriate to hide behind the civil war situation and automatically find that claimants from Somalia are not Convention refugees. In this case, the Trial Division found that there was compelling evidence that the claimant, having married a Darod man, would be at heightened risk. The court concluded that the Immigration and Refugee Board should have examined that aspect.

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[54] (F.C.T.D. A-65-93, February 15, 1994).

[55] (1995) 90 F.T.R. 230 (F.C.T.D.).

Similarly, in *Hotaki -v- Canada (Minister of Employment and Immigration)*,[56] the claimant was a citizen of Afghanistan. His father had been highly placed in the former Communist government and had arranged for the claimant to become a teacher in a school for the children of other Communist government officials. When the Mujahedeen invaded Kabul in April, 1992 the claimant`s father was killed in his office and one of the claimant`s brothers disappeared. His home was also visited regularly by Mujahedeen guerillas. The IRB denied the claim on the ground that the claimant simply feared the ill effects of civil war. The Trial Division disagreed, holding that the claimant had been personally and differentially targeted and was, therefore, not suffering from the fear felt indiscriminately by all citizens as a consequence of the civil war. His father had been politically aligned and of relatively high profile, the claimant`s teaching position brought him daily into contact with the sons and daughters of others who were politically aligned and the claimant had been sought out by name. These were all factors which distinguished the fear of the claimant from that felt indiscriminately by others.

The case of *Alexandre -v- Canada (Minister of Employment and Immigration)*,[57] is quite instructive in respect of situations of severe internal instability, short of civil war. The claimant was an ethnic Haitian from Venezuela. She experienced death threats, harassment, thefts and insults against which the authorities refused, or were unable, to provide protection. Although the claimant believed she had been victimized, because she was black, that was not the only interpretation that could have been placed on the situation. There was evidence that there was no official discrimination against black Venezuelans and that at the time of the problems, Venezuela was going through a period of severe instability. In the Court`s view, the incidents related, whether theft by neighbours

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[56] (1994) 88 F.T.R. 43 (F.C.T.D.).

[57] (1994) 84 F.T.R. 187 (F.C.T.D.).

or abusive police action, were all of a type which the entire population may have undergone at some time or another, but which could in no way be attributed to factors of any particular race or nationality.

The recent case of *Sheriff -v- Canada (Minister of Citizenship and Immigration)*[58] demonstrates further that the general rule demanding the proof of differential victimization based on civil or political status by a victim of a civil war still holds sway under Canadian law. In the case, the applicant, one Mr. Mohamed Ibrahim Sheriff, left Sierra Leone to come to Canada to study in January,1997. He claimed refugee status from Canada two years later in June, 1999 on the basis of fear of returning due to the uncertain nature of events and the possibility of another war erupting in his country. The CRDD found that the applicant had not satisfied the burden of establishing that he had a well-founded fear of persecution for Convention ground reasons and refused his claims. He sought judicial review of this negative decision. He argued, *inter alia*, before the Federal Court-Trial Division that he had established a nexus with a Convention ground, in that as a citizen of Sierra Leone he has a well-founded fear of persecution by reason of his nationality. The respondent Minister submitted that there is an armed conflict in Sierra Leone and that the applicant had the burden to establish that his fear was not only that of all citizens who fall victim to armed conflict, but one that could be linked with a Convention ground. It was the Minister`s contention that the applicant had failed to meet this standard. Blanchard J. held that the evidence before him did not establish that the applicant was targeted in some way different from the general victims, or the general population of Sierra Leone. He observed that neither was there any evidence that all citizens of Sierra Leone are being persecuted because of their "nationality". For the court, it may be that all individuals within

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[58] [2002] F.C.J. No. 5 (Blanchard, J.).

Sierra Leone face more than a possibility of danger and persecution, but there is no basis to support the contention that they are being persecuted because of their "nationality". The application for judicial review was therefore dismissed.

It is true that the argument made by the applicant connecting his fear of persecution to the Convention ground of nationality might well have an unintended consequence of making the whole population in Sierra Leone eligible for refugee status in Canada. It is recommended that in some exceptional situations, humanitarian and compassionate considerations should be factored in to the assessment of refugee claims made by victims of armed conflicts. Blanchard, J. in *Sheriff's case* commented that he would subscribe to the reasons of the IRB panel which found that, although the applicant may not be at risk of persecution for a Convention reason, there is more than a possibility that the applicant would be at risk in the dangerous context of Sierra Leone. To this extent, the honourable judge and the CRDD urged that consideration should be given by the appropriate authorities to the grant of a landed immigrant status to Sheriff, the applicant, under humanitarian and compassionate grounds.[59]

This position is further buttressed by the reality in Africa where there is an inevitable political configuration, sequel to the democratic principle of majority rule, which enables the ethnic group with the largest population to remain in governance for an indefinite period of time to the chagrin of the minority ethnic groups which also yearn for opportunities to participate in governance. This

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[59] It is opined that if the court had the benefit of IRPA's enactment at the time it rendered its decision, it could have relied on the provisions of s. 97 of the statute which provides for the category of "person in need of protection"to extend surrogate protection to Sheriff. The section states in subsection (1) that: [a] person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally (a) to a danger on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or (b) to a risk of cruel and unusual treatment or punishment . . . "

deprivation of a sub-group of the population often leads to the persecution of the vocal members of such sub-groups who are considered treacherous by members of the majority ruling ethnic group. Issues of this nature have been the causes of armed conflicts in Africa. Presumably, this may qualify for persecution on the Convention ground of political opinion or nationality and a refugee status claimant found in this category will be eligible for international protection.

It is recommended that decision-makers vested with the responsibility of the conferment of refugee status on applicants and the judiciary should be highly sensitive to the circumstances of claimant(s) arriving from an area which is experiencing a national armed conflict or generalized violence. This will facilitate a just atmosphere wherein a comprehensive inquiry be made of the claim in order to ascertain, with a relatively commendable degree of adequacy, whether or not the risk faced by a particular individual or group is grounded in a civil or political status, before granting or refusing refugee status.

It is comforting to note that the Pre-Removal Risk Assessment regime is now in place in Canada so that if there is a negative decision rendered by the RPD, in which case the claimant is not recognised as a Convention Refugee, and he or she feels that there is an extant risk on return to the country of origin, an application may be made to the Minister for protection against a removal order that is in force.[60] Prior to the enactment of the *IRPA*, this arrangement was known as the Post Determination Refugee Claimants in Canada Class (PDRCC). It is an element of Canada's public policy concerning refugee claimants which addresses the belief that persons who may be exposed to compelling personal risk if removed from Canada should have the opportunity to apply for permanent

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[60] S. 112(1) of IRPA states that: [a] person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

residence from within Canada. The risk that the applicant claims he/she is facing must be objectively identifiable and shown to involve the possibility of risk to his/her life, extreme in intensity as a sanction or inhuman in all its ramifications. To this effect the Pre-Removal Assessment protection does not include persons:

1. whom the Refugee Division found not to have a credible basis for their claim;
2. who withdrew their claim or whose claim was declared abandoned;
3. who have left Canada since their claims were decided;
4. who have been convicted of a serious crime;
5. who have committed war crimes or crimes against humanity, or who have been found guilty of acts contrary to the purpose and principles of the United Nations; or
6. who have departed and returned to Canada from a contiguous territory (United States, St. Pierre and Miquelon) to file a second refugee claim within six months of the date of departure.[61]

3.4.2. Refusal to participate in military service

The United Nations High Commissioner for Refugees`s Handbook stipulates that:

> " A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution."[62]

Thus, before a person can claim refugee status while on a flight from a national call to participate in military service, he will have to show that desertion or evasion is based on a political opinion. To this extent, most countries in determining refugee applications make a distinction between "fear of persecution" and "fear of prosecution". The general principle in this respect is that refugee claimants

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[61] Ss. 112-114 of IRPA.

[62] UNHCR Handbook, *supra*, note 13, at 40.

who fear punishment because they have resisted sovereign States involved in internal armed conflict are often deemed ineligible for refugee protection, because they are found not to fear persecution on account of political opinion, but prosecution under laws of general application.[63]

In Canada, claims which involve failure to participate in or perform military service are generally considered to be outside the scope of the definition of the 1951 Convention unless certain conditions are fulfilled. One of these conditions is that, if there is evidence to show that conscription into the military service is conducted in a discriminatory manner or that prosecution or punishment for evasion is based on any one of the five Convention grounds, then a refugee status claim would have been established. This can be exemplified by situations where "only members of a particular racial group are subject to conscription, where the military service obligation is enforced more rigorously against persons of a particular political perspective, or where the penalty for evasion or desertion is applied differently to members of a given religious group . . .".[64]

Desertion or evasion that reflects an implied political opinion as to the fundamental illegitimacy in international law of the military service is another basis on which refugee claims have succeded. In *Zolfagharkhani -v- Canada (Minister of Employment and Immigration)*,[65] the claimant, a citizen of Iran, was conscripted into the Iranian army as a paramedic under a law of general application. He deserted and fled the country because his conscience was troubled when he learned that the Iranian government might engage in chemical warfare against his fellow countrymen, the Kurds. He claimed

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[63] See, Mark R. Von Sternberg, "Political Asylum and the Law of Internal Armed Conflict : Refugee Status, Human Rights and Humanitarian Law Concerns" (1993), Vol.5, No. 2. *International Journal of Refugee Law* at 153 - 180.

[64] Hathaway, *supra*, note 14 at 180.

[65] [1993] 20 Imm. L.R.(2d) 1, 55 N.R. 311 (FCA).

Convention refugee status on the basis of his fear of persecution because of his political opinion. The IRB rejected the claim on the grounds that the claimant feared not persecution, but prosecution under a law of general application. On judicial review, the central question concerned the status of a conscientious objector in relation to the definition of Convention refugee. The Court recognized that where the type of military action with which an individual does not wish to be associated is condemned by the international legal community as contrary to basic rules of human conduct, punishment for desertion or draft evasion could in itself be regarded as persecution. According to the Court, the records indicated the total revulsion of the international community to all forms of chemical warfare, as evidenced by the *Convention on the Prohibition of the Development, Protection and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction*[66], which both Canada and Iran ratified on December 16, 1971.

The Federal Court of Appeal considered the matter again in *Al-Maisri -v- Canada (Minister of Employment and Immigration*,[67] where the claimant, a citizen of Yemen, subsequent to Iraq`s invasion of Kuwait in 1990, was called to serve in the Yemenese military and sent to Jordan to fight in defence of Iraq. As the claimant strongly opposed the invasion of Kuwait, he deserted. He faced punishment for desertion in Yemen. The Court of Appeal ruled that the United Nations` condemnation of Iraq`s invasion and annexation of Kuwait established that Iraq`s actions were contrary to the basic rules of human conduct, and that therefore whatever punishment the claimant

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[66] 1015 U.N.T.S. 163, which entered into force on March 26, 1975.

[67] (1995) 183 N.R. 234 (FCA). See also, *Citric -v- Canada (Minister of Employment and Immigration)* (1993) 71 F.T.R. 300 (F.C.T.D.).

may face for refusal to serve in a military action supportive of Iraq`s actions would in itself constitute persecution. Accordingly, the claimant was declared by the Court to be a Convention refugee.

A third category of cases that are carefully reviewed as possible exception to the exclusion of those refusing to participate in military service from the scope of Convention refugee definition is that of persons considered as having the right to conscientious objection. This right draws from the Universal Declaration of Human Rights, 1948,[68] and the International Covenant on Civil and Political Rights,[69] which provide for right to freedom of thought, conscience and religion. In *Sladoljev -v- Canada (Minister of Employment and Immigration)*,[70] the Trial Division held that it is open for a contracting State to grant refugee status to persons who object to performing military service for genuine reasons of conscience. In *Popov -v- Canada (Minister of Employment and Immigration)*,[71] the Federal Court opined that the usual meaning of the phrase "conscientious objector" is a pacifist, or a person who is against war and all militarism on the grounds of principle, either religious or philosophical. It held in this case that it was quite reasonable for the IRB to have concluded that, since the claimant had served in the Russian army, he could not be considered to be a conscientious objector vis-a-vis the Israeli army. The court further decided that there was no evidence that Israel`s military activity against the Palestinians contravenes international standards. Although the evidence did contain accounts of violations from time to time, isolated incidents of the violation of international

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[68] U.N.G.A. Res. 217A (III), December 10, 1948.

[69] U.N.G.A. Res. 2200 (XXI), December 19, 1966, which entered into force March 23, 1976.

[70] (F.C.T.D. IMM-3160-94, July 4, 1995).

[71] (1994) 75 F.T.R. 90 (F.C.T.D.). See also, *Tkachenko -v- Canada (Minister of Citizenship and Immigration)* (F.C.T.D. IMM-802-94, March 27, 1995); *Velickovic -v- Canada (Minister of Citizenship and Immigration)* (1995) 96 F.T.R. 1 (F.C.T.D.), and *Sakovich -v- Canada (Minister of Citizenship and Immigration)* (F.C.T.D. IMM-749-95, October 19, 1995).

standards during an armed conflict is not the kind of activity which bestow the character of a Convention refugee on a person who had refused to participate in it. That would require illegal military activity which is condoned in a general way by the State and the military forces.

3.5. A Review of the I.R.B. Chairperson's Guidelines[72]

Many claims have been made by civilian non-combatants who are already in Canada but are fearing return to a situation of civil war in their home State. This is coterminous with the question posed in earlier paragraph as to whether a person in a foreign State can claim refugee status in that State on the basis of a civil war in his home State. The clear legal position in Canada is that claims involving situations of civil war, need to be supported by the satisfactory establishment, on the part of the claimant, of all of the elements of the statutory definition of Convention refugee.[73]
The Guidelines start from a basic proposition: although those fearing return to such situations ought not to be deemed Convention refugees by that fact alone, there is nothing in the definition of Convention refugee which excludes its application to claimants fearing return to situations of civil war.[74] A critical scrutiny of a number of cases where the Convention Refugee Determination Division (CRDD) has determined that civilian non-combatants fearing return to situations of civil war are not

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[72] The Guidelines, *supra*, note 46.

[73] It should be observed that pursuant to the Council of Europe resolutions, individual European countries have put in place some domestic protection arrangements which make it possible to accommodate persons who do not meet the Convention refugee requirements but are nonetheless victims of armed conflicts and broad-based human rights violations. Sweden uses the concept of "B" status in Swedish law to temporarily admit such persons with residence permits. Portugal grants asylum to armed conflict victims under its Act 38/80, August 1, 1980, Art. 5, para. 2, amended by Act 415/83, November 24, 1983. German law makes provision for the residence of persons who face civil war or foreign occupation in their country of origin under Deutscher Bundestag, 10 Wahlperiode, Drucsache 10/3346 (1985). See further, Hathaway, *supra*, note 14, at 22.

[74] *Supra*, note 46.

included within the definition of Convention refugee will show that the Board is largely unfamiliar with the peculiarities of the prevalent situations in such countries.[75]

Before looking at cases which involved the consideration of internal armed conflict situations, it is important that a word is mentioned about the Guidelines. In Canadian administrative law statutory decision-makers may not fetter their discretion by adopting 'Guidelines' or policies that they treat as binding. The Chairperson`s Guidelines avoid this problem in two ways: (a) they are not binding[76] and (b) they have statutory authorization.[77]

In the effort to resolve the complexities entailed in the analysis of refugee claims hinged on civil war, four major issues are directed for consideration by the Guidelines issued by the IRB Chairperson: (1) what factors should be considered in determining whether the claimant`s fear of persecution is well-founded?; (2) does the harm feared constitute "persecution" within the definition of Convention refugee?; (3) what principles should decision-makers apply when determining whether the claimant`s fear of persecution is based on one or more of the grounds set out in the definition of

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[75] *Infra*.

[76] In a situation where there is no statutory authority for the guidelines as subordinate legislation and the guidelines "crossed the Rubicon" to assume a mandatory character, it will be regarded as an abuse of discretion. See, *Ainsley Financial Corp. -v- Ontario (Securities Commission)* (1994) 121 D.L.R. (4th) 79, Doherty, J.A., while dismissing the appeal before the court highlighted two factors which suggest that a Policy 1.10 before the court for consideration "crossed the Rubicon": viz; first, in format, it appears more like a detailed code of conduct than a general statement of principle; and second, the policy statement suggests that non-compliance could evoke sanctions and this in effect is coercive in tone. See also, *Wimpey Western Ltd. -v- Director of Standards and Approvals of the Department of the Environment* (1982) 21 Alta. L.R. (2d) 125 (Q.B.) and *Capital Cities Communication Inc. -v- CRTC* [1978] 2 S.C.R. 141.

[77] The Chairperson has the statutory authority to make them pursuant to s. 159(1)(h) of *IRPA*. See also, *supra*, note 46. It is worthwhile to comment also that its content as general statements of principles, standards, and criteria which are simply intended to give guidance passes the litmus test for validity as elucidated in the *Ainsley* case.

Convention refugee?; (4) what are the key evidentiary elements that decision-makers should look to when considering a claim arising out of a situation of civil war?

In the framework of analysis provided by the Guidelines in the process of determining whether, under all the circumstances, the claimant`s fear is well founded, it is imperative to assess the evidence related to the availability of adequate State protection and also ascertain that there is an objective basis to the claim. To satisfy these goals, the IRB considers if there is an established authority from which protection may be sought and ensure that adequate protection is available. This criterion emanates from the Supreme Court of Canada decision in *Canada (Attorney General) -v- Ward.*[78] The difficulty lies in the phrase "adequate protection". In other words, when is it satisfactory for the determining authority to declare that adequate protection is either available or not? Further, the Guidelines' framework nudges the recognition on the part of the IRB members, of the difficulty of acquiring information on the prevalent conditions in the claimant`s country.[79]

The framework also prescribes that the Board should assess the particular circumstances which have given rise to the claimant`s fear of persecution and determine whether the harm feared constitutes persecution. The Guidelines states that persecution must entail a serious form of harm which derogates or detracts from the claimant`s human rights and fundamental freedoms.

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[78] [1993] 2 S.C.R. 689.

[79] It is one of the recommendations of this thesis that in order to confront this problem and effectively resolve the issues around it, the appointment of members of the Immigration and Refugee Board should reflect the inclusion of those who are extensively knowledgeable in international affairs. This can be eventually narrowed down to a person considered to be a specialist in the foreign affairs of the region of the world where the claimant hails from. The existing arrangements made for the members of the Board who are currently serving to update them through seminars and lectures on human rights situations around the world is commendable and should be further intensified. The IRB Documentation Centres which are a unique resource that provides claimants, their lawyers and Board members with extensive, up-dated information on country conditions around the world should be financially enhanced to enable them render more effective services.

Interestingly enough in this respect, the Guidelines have striven to establish the paradigms by which the scope and significance of the detraction from the claimant's human rights can be tested and assessed.[80] They state that for the analysis of this criterion, the degree and importance of the rights and freedoms violated must be examined in relation to how the concept of persecution has been defined in Canadian jurisprudence. The Guidelines also state that the objective standards provided by international human rights instruments that relate to the position of civilians in non-international armed conflicts be followed by the IRB.[81] The scope of the test is also broadened to include the entirety of the Canadian jurisprudential definition of the term "persecution" in such a manner that is not restricted to the violation of rights or interests protected in the international instruments.

The question that is most complex concerns principles that decision-makers should apply when determining whether the claimant's fear of persecution is based on one or more of the grounds set out in the definition of Convention refugee. The question has been alternatively framed as: Is the harm feared as a result of the targeting of the claimant or her group on the basis of any one, or a combination, of the grounds in the definition of Convention refugee? The Chairperson pointedly directed the following for consideration:

- the intention of the agent of persecution must be assessed;

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[80] This is unlike the stipulation for availability of "adequate protection" as discussed in the preceding paragraph.

[81] *Supra*, note 6. In *Rajudeen -v- Canada (Minister of Employment and Immigration)* (1984) 55 N.R. 129 (FCA), it was suggested that the dictionary definition of "persecution" as "systematic infliction of punishment" or "to afflict persistently" is helpful in understanding the term. See also, *Salibian -v- Canada (Minister of Employment and Immigration)* [1990] 113 N.R. 123 (FCA), where the Court of Appeal held that the persecution need not have occured in the past, but can be impending in the future.

- intention may be inferred from the effect that the actions of the agent of persecution have on the claimant or her group;
- a claimant need not be individually targeted for persecution;
- it is necessary to ascertain the characteristic which places the claimant or members of her group at risk and the linkage to a Convention ground;
- the level of risk of persecution should not be compared to that of other individuals or groups in the country of origin;[82]
- as civil wars are often waged for reasons related to a Convention ground, caution should be exercised before determining that there is not a linkage to a ground.[83]

For the purpose of tackling the issue of whether the persecution feared is based on a Convention ground or not, the Chairperson identified the types of claims that have been presented to the IRB

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[82] This is a salutary shift from the "particularized evidence rule" which manifested in the previous position that the claimant must be able to show that he/she has been personally singled out for persecution. The case of *Salibian -v- Canada (Minister of Employment and Immigration) supra*, note 81, marked the watershed in this respect. The Federal Court of Appeal held in the case that in order to claim Convention refugee status, there is no need to show personal targeting. Also in *Hassan -v- Canada (Minister of Employment and Immigration)* (1994), 174 F.T.R. 74 (F.C.T.D.), the court held that the status of refugee is attached to an individual and is granted on the basis that this individual needs protection from personal harm and persecution that he or she may suffer in his country over and above what would come from a state of general oppression affecting all inhabitants of the country. The court emphasised that this principle relates to the object of the fear, not to its well-foundedness or reasonability. It confirms that it has nothing to do with the question of whether one may have a reasonable fear of being personally a victim of persecution for the sole reason that one belongs to a specific targeted group whose members are indiscriminately subject to persecution. See also, *Rizkallah -v- Canada (Minister of Employment and Immigration)* F.C.A. A-606-90, May 6, 1992); *Ali -v- Canada (Minister of Citizenship and Immigration)* (F.C.A. A-772-96, January 12, 1999).

[83] This is the herculean task that decision-makers are facing in this category of claims, i.e. those arising from civilian non-combatants fearing persecution in civil war situation. It is one of the pivotal pillars for the recommendation in this thesis that the bases for the recognition of eligibility for the conferral of refugee status on victims of national armed conflicts should be liberalized and expanded.

as arising in civil war context. They are categorized by the Chairperson in three broad ways, namely:

(1) **Fear of persecution in a generalized civil war** - in this group are three sub-groups of:

(a) individualized harm that is distinguishable from the general dangers of civil war, e.g. persons facing persecution for refusing to join either side in the armed struggle out of a desire to remain neutral, a conscious political choice or other reasons of conscience; human rights activists, journalists and other citizens threatened with measures of persecution for investigating and/or criticizing military, paramilitary or guerilla activities and atrocities;

(b) group-based harm that is distinguishable from the general dangers of civil war, e.g. members of an ethnic group who are being selectively denied State protection on the basis of their ethnicity; women and children who because of their social or political role or because of their association with certain individuals (including family members) are targets of deliberate violence and abuse; or members of a clan who are perceived as associated with another clan that had ruled the country prior to the civil war and might by reason of that perceived association, face persecution;

(c) harm that is not distinguishable from the general dangers of civil war - this last sub-group can not be used to justify a linkage with a Convention ground.

(2) **Fear of persecution arising from a civil war specifically directed against a group with which the claimant is affiliated** - in this group the violence involved is targeted at a group that is different from the remaining population by identifiable racial, social or political features. This kind of persecution has nexus with the Convention requirements.

(3) **Fear of persecution from circumstances unrelated to the civil war** - in this group are claims made by person(s) from a country in civil war but the danger being feared is not associated, directly or indirectly, with the war. Union leaders facing threats of persecution for promoting unionism and members of a minority group treated in a persecutory manner which is unrelated to the civil war, are some examples cited by the Chairperson in the Guidelines. The Chairperson in these situations directs that claims such as these should be determined without reference to the civil war framework. In effect, a claimant in this scenario may end up being recognised as a Convention refugee if the fear of persecution is related to one of the five Convention grounds.

The framework finally addresses the question in respect of what are the key evidentiary elements that decision-makers should look to when considering a claim arising out of a situation of civil war? In answering that, it proffers that, if required the decision-maker should determine whether there is the possibility of an internal flight alternative (IFA), or whether other issues require analysis. To satisfy this criterion for analysis of a claim, the state of infrastructure and economy in the internal flight alternative (IFA) region should be assessed. This will involve a consideration of the practical existence or destruction of those infrastructures such as roads, bridges, etc. The stability or instability of the government that is in place there is also material for the purpose of arriving at a decision on this. Secondly, the decision-maker should examine whether or not there would be undue hardship on the claimant, both in reaching the location of the internal flight alternative and in establishing residence there. If there is an effective internal flight alternative, the claimant is not a Convention refugee. A consideration of a few decided cases will throw light on this criterion.

In *Elmi -v- Canada (Minister of Citizenship and Immigration)*[84], there was an application for judicial review of a decision of the Convention Refugee Determination Division (CRDD) which found that the applicant, Elmi, was not a Convention refugee. Elmi was a citizen of Somalia from Kismayo who, when 16 years old, had claimed refugee status on the basis of a fear of persecution as a member of the Darod clan and the Majertan sub-clan, and as a young male subject to forcible recruitment. In denying the claim, the Refugee Division had found that Elmi had an Internal Flight Alternative (IFA) to Bossaso. The Federal Court - Trial Division allowed Elmi`s application and set aside the decision of the Refugee Division of the IRB. It held that in assessing the reasonableness of an internal flight alternative, the fact that an applicant was a child had to be taken into account. In spite of the fact that there was no serious possibility of Elmi being persecuted in the proposed IFA of Bossaso and the lack of evidence by the applicant to show that he would be unable to reach the IFA without travelling through unsafe areas, McKeown, J. decided that it was necessary for the Refugee Division to address the issues arising from Elmi`s young age when assessing the reasonableness of his IFA to Bossaso. In his opinion, the CRDD would have to take into account evidence as to whether Elmi had ever been to Bossaso, had any family members there, had not lived in Somalia since the age of 10, had any means of supporting himself or earning income, would have to live in dire poverty, and would have any access to schools, hospitals or other services.

The issue of internal flight alternative also arose in an interesting manner in *Malik -v- Canada (Minister of Citizenship and Immigration)*[85] where the applicant sought judicial review of a decision that he was not a Convention refugee. Malik was a citizen of Pakistan who claimed a well-founded

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[84] [1999] F.C.J. No. 336 (McKeown, J.)

[85] [2002] F.C.J. No. 297 (O`Keefe, J.)

fear of persecution on the basis of his membership in a religious minority. There was evidence that he had received a threat to be shot and that his store was attacked by two gunmen. He notified the police, who claimed to be helpless in curbing or offering protection against sectarian violence. The CRDD found that there was adequate state protection for Malik in Pakistan, and that there was an internal flight alternative. Malik claimed that he was given insufficient notice that the Board would be considering an internal flight alternative. He further submitted that the Board erred in its finding that there was an internal flight alternative. O'Keefe, J., held that the application would be allowed based on the evidence of police reaction to violence which made it unreasonable for the Board to conclude that State protection was available. He concluded that Malik had been given sufficient notice that the internal flight alternative was to be an issue, but the Board erred in concluding that an internal flight alternative was available because the Board failed to address the evidence that Malik would have had the same problems in a different town. The Federal Court remitted the matter to a different panel of the IRB for re-determination.

The Federal Court - Trial Division on other occasions has dismissed applications for judicial review based on the issue of internal flight alternative. In *Shire -v- Canada (Minister of Citizenship and Immigration)*,[86] an application was made by Shire, a Somalian, for an order setting aside a decision by the Immigration and Refugee Board that he was not a Convention refugee. He had applied for a Convention refugee status based on the fact that his father protected a member of a rival clan in Somalia and was known as a traitor to his clan. Shire claimed that his family suffered from the conflict between the two clans. The Board found that Shire was not a Convention refugee and had an internal flight alternative in Somalia. The Board noted the passage of seven years since the incident. Shire

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[86] [1999] F.C.J. No. 220 (Reed, J.)

argued that the Board`s finding was perverse, capricious and was made without regard to the material. He claimed that members of his father`s clan considered his father to be a traitor and the Board expected Shire to now live safely among members of the same clan in a different area. Reed, J. held that it was not capricious or perverse for the Board to have discounted Shire`s fears because of the passage of time and because it expected him to move to a different area of Somalia. The court held that the Board did not ignore Shire`s evidence as it was not expected to accept his speculations, particularly as they were based on generalized statements with no concrete factual underpinnings.

While the judicial system should not defer to speculative cause or litigation, there is no gainsaying the fact that in some parts of the world consisting mainly of developing countries, deep-rooted ethnic confrontations and bitterness between one ethnic group and another are oftentimes passed on from one generation to the other. If ethnic hatreds, rivalries and suspicions are thus generational, as are in Africa, some parts of Europe, Middle and Far East and Asia, a passage of a period of seven years, as it was in *Shire*`s case, will be considered insignificant. It is suggested that decision makers should be sensitive to the peculiarity of each case before them. This case aptly illustrates the fact that 'broad' interpretations as envisaged by the Chairperson in drafting the 'Guidelines' may still remain elusive until a clear provision is put in place by the Refugee Convention.

3.6. The Issue of "Broad" Interpretation of the Refugee Convention

David Matas[87] argues that the refugee definition in the 1951 Refugee Convention provides protection that is broad enough to cover innocent victims fleeing civil war. He contends that how widely or narrowly the refugee definition is interpreted depends on how widely or narrowly the five

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[87] See, D. Matas, "Innocent Victims of Civil War as Refugees" (1993) 22 *Man. L. J.* 1 at 2.

Convention grounds, i.e. race, nationality, membership in a social group or political opinion, are interpreted.

With respect to political opinion, Matas is of the view that there is both a limited and an expansive approach to the interpretation of the concept. The limited approach, according to him, is to insist that the claimant actually has a political opinion opposed to that of his persecutors and that the claimant acts on the opinion. The expansive approach is to accept a person as a Convention refugee no matter what his or her political opinion or activity and even if a person has no political opinion or activity at all, as long as the agents of persecution believe the person to be politically opposed to them.[88] The problem with this expansive approach lies with the burden of proof. For instance, how will a refugee claimant demonstrate the belief of the agent of persecution to the decision-maker? The IRPA puts the onus of proof on a claimant[89] and this duty can be practically discharged only when the facts and evidence are within the control of the applicant. The belief of the agent of persecution does not fall within the ambit of facts and evidence that are under a putative refugee`s control.

In respect of the concept of membership in a social group, Matas states that it can be approached narrowly by insisting that the group be defined by some internal associational characteristic or an external immutable characteristic,[90] or it can be approached broadly by defining social group to include any grouping whatsoever as long as members of the group, solely because of their

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[88] *Ibid.*, at pp. 7-8. See also, *Canada (Attorney General) -v- Ward* [1993] 2 S.C.R. 689.

[89] S. 100(4) of IRPA provides that: "[T]he burden of proving that a claim is eligible to be referred to the Refugee Protection Division rests on the claimant, who must answer truthfully all questions put to them. If the claim is referred, the claimant must produce all documents and information as required by the rules of the Board ".

[90] D. Matas, *supra*, note 87 at 9.

membership in the group, are the object of persecution. Matas' broad concept of social group will remain unrealistic and contradictory to the Supreme Court of Canada`s decision in *Canada (Attorney General) -v- Ward*[91] where the test for identifying a "particular social group" has been streamlined to include: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.[92] Nevertheless, whether the interpretation is narrow or broad, victims of civil conflicts under the existing legal order must establish a nexus with one or more of the Convention grounds. It is the avoidance of this burden on innocent victims of civil conflicts that this thesis seeks to achieve. In so far as this requirement remains universally mandatory, the fate of a refugee claimant fleeing civil conflict continues to be uncertain.

The most effective way of avoiding the unpredictability of courts' and other decision-makers' interpretation of these concepts is to have an instrument which is clear enough to specify that innocent victims of civil conflict are eligible to international/surrogate protection while the armed conflict continues in the country they are fleeing. This could take the form of an additional protocol to the Refugee Convention which provides that:

> (1) The term "refugee" shall also apply to every innocent person who has fled his place of habitual residence because his life or safety has been threatened by generalized violence, external aggression, internal or civil conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order in either part or the whole of the country of origin or nationality or place of habitual residence.

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[91] Ward, *supra*, note 88. The commentaries of La Forest, J. is noteworthy in respect of the relaxation of the test especially for the second grouping.

[92] *Ibid.*, at p. 744.

(2) An innocent victim of civil conflict who has fled a civil war situation and is making refugee claim in a signatory State Party is hereby exempted from establishing persecution on the grounds of race, religion, nationality, membership in a social group or political opinion before refugee status is conferred.

(3) The refugee status conferred under this Protocol shall remain in effect at least for the duration of the civil conflict subsequent to which the host State may permit continued stay of the person or decide to send such a person back, provided there is no risk to his life.

CHAPTER FOUR

INTERNATIONAL HUMAN RIGHTS AGREEMENTS AND NORMS

4.1. Introduction

This section is an attempt to demonstrate how human rights violations can be used as an interim option to avail victims of civil war of some form of protection in Canada, at least until the situation they are fleeing improves. The discussion of these alternative legal recourses does not foreclose the need for an amendment to the existing Refugee Convention. This is because, first, the case law in Canada does not show that the courts and other decision-making agencies have adopted the reasoning being proffered in this analysis. A clearly worded, amended Refugee Convention will eliminate unpredictable outcomes that follow from relying on the judgement/discretion of individual decision-makers. Secondly, if the existing Refugee Convention is not amended by specifically making innocent victims of civil war eligible to protection, the courts and other decision-makers are likely to continue insisting on the establishment of the nexus requirements for this category of claimants.

4.2. The Constitutional Nature of Human Rights in Canada

The *Canadian Charter of Rights and Freedoms* came into force on April 17, 1982 and guarantees rights and freedoms contained therein subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[1] It contains broad categorizations into

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[1] S. 1 of the *Canadian Charter of Rights and Freedoms*, 1982 - (hereinafter referred to as "the Charter") - Constitution Act, 1982, Schedule B, Part 1.

democratic rights,[2] mobility rights,[3] legal rights,[4] equality rights,[5] and minority language educational rights.[6]

Salient to the critique in respect of human rights violations and the refugee system in this country are some selected sections which will be highlighted in the course of discourse without prejudice to the relevance of the other sections of the Charter. The most prominent of these provisions are sections 7, 12 and 15 of the Charter. Section 7 provides that:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

This section has received repeated consideration by Canadian courts and decision-makers in refugee determination cases. Section 12 of the Charter is another provision that has been active in respect of refugee matters. It provides that:

> "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

Also of frequent usage in the Canadian refugee system is section 15(1) of the Charter which stipulates that:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

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[2] *Ibid.* ss. 3-5.

[3] *Ibid.* s. 6.

[4] *Ibid.* ss. 7-14.

[5] *Ibid.* s. 15.

[6] *Ibid.* s. 23.

The question as to which human rights standards are to be used in assessing a breach or violation of a putative refugee's rights in Canada, as between the set of rights contained in the Charter or the international human rights documents,[7] pales into a lesser degree of significance. This is because Canada is a signatory to these international instruments and has incorporated the rights stipulated in them into its body of laws.[8]

The *Immigration and Refugee Protection Act* (IRPA) states that it is to be construed and applied in a manner that, *inter alia*, ensures that decisions taken under it are consistent with the Charter, including its principles of equality and freedom from discrimination[9] and secondly, in a way that complies with international human rights instruments to which Canada is a signatory.[10]

It is also important to emphasise that one of the objectives of the Canadian refugee system is to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment.[11]

4.3. The Nature of Refugee Rights

Prior to the twentieth century, international law was conceived of primarily in terms of relationships between sovereign States. The rights of the individual were taken into consideration

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[7] See Chapter 1, *supra*, notes 13-15.

[8] There is a great deal of harmony between the set of rights contained in the Charter and the detailed content of these international human rights instruments.

[9] *IRPA*, s. 3 (3)(d).

[10] *IRPA*, s. 3 (3)(f).

[11] *IRPA*, s. 3(2)(d).

only in the context of being an extension of the rights of the State of which he is a national or member. In the realm of State responsibility, the former Permanent Court of International Justice decided in *Mavrommatis Palestine Concessions Case (Jurisdiction)*[12] that there is a limit to which the individual can feature in an international claim where he has suffered an injury. The international legal system expects the injured subject's claim to be processed through his State as against the State responsible. In a corollary, a national of one country could travel to another country and enjoy protection, not because his status as a human being entitled him to it, but because the government of the State to which he travelled had undertaken obligations with the State of nationality that were reciprocal in character and which ensured that the national of both States could travel very freely and undisturbed.[13] The position of the refugee is different. There is no State to provide him with such protection and therefore he cannot benefit from such arrangements.[14]

The Holocaust caused many sovereign States to come to the realisation that national laws are capable of being manipulated to wreak havoc on citizens of any sovereign State. The enormity of the dreadful things that happened in the events leading up to and during the Second World War, prompted the proclamation in the *Universal Declaration of Human Rights* to the effect that States did not have unlimited powers to abuse their citizens.[15] This Declaration and other international conventions which it inspired dealt mainly with the protection of individuals against the actions of

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[12] Pub. P.C.I.J. (1924), Series A, No. 2. at p. 12.

[13] J. Stern, "Refugees' Rights and International Obligation" in A. E. Nash (ed.), *Human Rights and the Protection of Refugees under International Law*, see, chapter 2, *supra*, note 1 at p. 43

[14] The International Labour Conventions regime is the closest in the international arena to have attempted the recognition of the rights of individuals prior to the 1951 Convention.

[15] U.N.G.A. Res. 217A (III), December 10, 1948.

their own States, but did not deal with the matters affecting refugees. The 1951 Convention and its 1967 Protocol were intended to fill that *lacuna*. To this extent it is logical to assert that the 1951 Convention and its Protocol are international human rights instruments. Under this regime, a person who comes to the territory of a State and asks for protection has the right to tell his story and to make his claim, the right to be judged on the merits of his case, and the right to be protected if he is a refugee according to the definition incorporated in the Convention.[16] Conversely, the State has the obligation to hear the putative refugee`s story, to adjudicate the claim in accordance with the principles of fairness, and to offer protection to the claimant if he meets the requisite standards.[17]

4.4. Human Rights Law as a Protective Mechanism for Civil War Victims

The 1951 Convention makes it a *sine qua non* for a refugee claimant to be in apprehension of a form of harm that can be depicted as "persecution". For there to be "persecution", the claimant must have been mistreated in one way or another. Mistreatment is evidenced when there has been a persistent violation of an individual`s basic human rights. Mistreatment must be of sufficient gravity to constitute persecution.

Since the term "persecution" is not defined explicitly in the Convention or the *Immigration and Protection Act*, it has become the responsibility of the courts to delimit the scope of the word. As a result, case-law has identified some general characteristics and specific behaviours as incidents of persecution. For mistreatment to be considered as persecution, it must be "serious" enough to

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[16] *Supra*, note 13, at 44.

[17] See *Singh -v- Canada (Minister of Employment and Immigration* [1985] 1 S.C.R. 177, which made oral hearings necessary in refugee claims in Canada.

compromise the interest of a refugee claimant and deny him/her of a core human right. In *Canada (Attorney General) -v- Ward*,[18] the Supreme Court emphasised the theme underlying the 1951 Convention as being the international community's commitment to the assurance of basic human rights without discrimination. In effect, there is the need for the proof and establishment of a systemic harassment by an individual who claims well-founded fear of persecution for the purpose of acquiring refugee status in Canada.[19] In the case of *Chan -v- Canada (Minister of Employment and Immigration)*,[20] La Forest, J. (in a dissenting judgment) asserted that the essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way. He further said:

> These basic human rights are not to be considered from the subjective perspective of one country . . . By very definition, such rights transcend subjective and parochial perspectives and extend beyond national boundaries. This does not mean, however, that recourse to the municipal law [i.e. domestic or internal law] of the admitting nation may not be made. For such municipal law may well animate a consideration of whether the alleged feared conduct fundamentally violates basic human rights.[21]

The existence of persistent harassment of the claimant in his/her State of origin constitutes persecution under Canadian law.[22] This statement brings to the fore the distinction between persecution on the one hand, and discrimination or harassment on the other. In the case of *Sagharichi*

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[18] [1993] 2 S.C.R. 689.

[19] See *Cheung -v- Canada (Minister of Employment and Immigration)* [1993] 2 F.C. 314 (C.A.).

[20] [1995] 3 S.C.R. 593.

[21] *Chan, Ibid.* at 635.

[22] See *Ward, supra*, note 17; and *Zahirdeen Rajudeen -v- Minister of Employment and Immigration* (1985) 55 N. R. 129 (F.C.A.).

-v- Canada (Minister of Employment and Immigration),[23] the Court of Appeal observed that "the dividing line between persecution and discrimination or harassment is difficult to establish."[24] It can be confirmed nonetheless that what distinguishes 'persecution' from 'discrimination' is the degree of seriousness of the harm. The statement of Muldoon, J. in *Nejad -v- Minister of Citizenship and Immigration*[25] shows how a particular characteristic of a given claimant, may also transform what ordinarily appears innocuous into persecution. He commented that:

> The CRDD did recognize and the Court agrees that there may be certain circumstances in which the particular characteristics or circumstances of a claimant . . . might affect the assessment of whether certain acts or treatments are persecutory. [To] . . . the extent that an agent of persecution intentionally plays upon or exploits the fact that a person suffers from a particular frailty or condition in order to cause harm, an act not normally or inherently persecutorial, may be transformed into an act of persecution.
>
> That is beautiful in theory, but who knows what is the intention of the persecutor? Who knows what is the particular knowledge of the persecutor? One must look at the act and the effect. And in this case, in particular, because of the old age of the applicants, it should have been more obvious to the CRDD panel that the effect upon them was that of persecution.[26]

This notion of persecution can be connected with the intention of the drafters of the 1951 Convention who presumably avoided the specification of a meaning to the term "persecution". The drafters had in mind for the purpose of defining "persecution" a consideration of the factors that induced the involuntary migration during and immediately after the Second World War such as the

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[23] (1993), 182 N.R. 398 (F.C.A.).

[24] *Sagarichi, ibid.* at 2.

[25] (F.C.T.D., No. IMM-2687-96).

[26] *Nejad, ibid.* at 2, per Muldoon, J. - July 29, 1997. See also *Zolfagharkhani -v- Canada (Minister of Employment and Immigration)* [1993] 3 F.C. 540 (C.A.).

deprivation of life and liberty inflicted by the Nazis. They also were seeking to restrict refugee protection to cases of maltreatment which are sequel to a breakdown of national protection.

The duty which a State owes its citizenry consists of the protection of the basic rights which international human rights documents have specified as mandatory minimum conditions to be respected by sovereign States in the international community.[27] These rights considered to be basic and inalienable within the international community are discussed below.

In the first group are rights enumerated in the International Covenant on Civil and Political Rights (ICCPR)[28] and from which no derogation is permissible whatsoever. These rights include freedom from arbitrary deprivation of life,[29] protection against torture or cruel, inhuman or degrading punishment or treatment,[30] freedom from slavery,[31] the prohibition on criminal prosecution for *ex post facto* offences,[32] the right to recognition as a person in law,[33] and freedom of thought, conscience and

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[27] It has been suggested by some scholars that it is only a subset of these human rights that are relevant when considering "persecution" in the context of refugee claims. Basing their reasoning on the provisions of Article 33 of the 1951 Convention which prohibits the return of a refugee to the frontiers of territories where his life or freedom would be threatened, they suggest that it is mainly deprivation of life or physical freedom that can constitute persecution. The more liberal scholars argue that all the rights contained in the international human rights instruments would constitute the standard, but exclude the restriction or denial of such rights as: freedom of thought, conscience and religion; freedom of opinion and expression; and freedom of peaceful assembly and association. See, A. Grahl-Madsen, *The Status of Refugees in International Law* (Leyden : A.W. Sijthoff, 1966) at pp. 193-196.

[28] ICCPR, *supra*, note 7.

[29] Art. 6.

[30] Art. 7.

[31] Art. 8.

[32] Art. 15.

[33] Art. 16.

religion.[34] The inability or unwillingness of the State to ensure that these rights of its population are protected is regarded as a breach of State duty and amounts to persecution.[35]

The second category consists of a different subset of rights in the same covenant, i.e. the ICCPR, from which States may derogate during a "public emergency which threatens the life of the nation and the existence of which is officially proclaimed".[36] They include: the right to equal protection for all,[37] freedom from arbitrary arrest or detention,[38] the right to internal movement and choice of residence,[39] including children[40] and minorities[41], the freedom to leave and return to one`s country,[42] the right in criminal proceedings to a fair and public hearing and to be presumed innocent unless guilt is proved,[43] the protection of personal and family privacy and integrity,[44] liberty of opinion, expression, assembly

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[34] Art. 18.

[35] See, *inter alia*, *Canada (Attorney General) -v- Ward*, *supra*, note 17, *Chan -v- Canada (Minister of Employment and Immigration)*, *supra*, note 19, and *Rodriguez-Hernandez, Severino Carlos -v- S.S.C.* (F.C.T.D.,No. A-19-93), Wetston, April 6, 1995, at 1.

[36] ICCPR, *supra*, note 7 at Art. 4(1).

[37] Arts. 3 and 26.

[38] Arts. 9-10.

[39] Art. 12(1).

[40] Art. 24.

[41] Art. 27.

[42] Art. 12(2)-(4).

[43] Art. 14.

[44] Arts. 17 and 23.

and association,[45] the right to form and join trade unions,[46] the ability to partake in government,[47] vote in periodic and genuine elections,[48] and access public employment without discrimination.[49] The failure of the State to respect these rights, except in real emergency situation will be regarded as a violation of the State's duty of protection. A derogation from this subset of rights is only permissible if it is reasonable in scope and duration or in terms of application to different sub-groups within the polity, the derogation impacts proportionately to all groups without any differential treatment. If the impact on different sub-groups is disproportional or differential in any manner, the derogation would amount to persecution against the group singled out for excessive impact.[50]

The third group of rights are those contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[51] These rights are not as binding as those contained in the International Covenant on Civil and Political Rights (ICCPR), given Article 2(1) which provides that:

> "Each State Party to the Covenant undertakes to take steps, individually and through international co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the

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[45] Arts. 19-22.

[46] Art. 22.

[47] Art. 25(a).

[48] Art. 25(b).

[49] Art. 25(c).

[50] See U. N. Doc. E/CN.4/1984/4 , for the report of the International Commission of Jurists' Group of Experts which was convened in 1984 to draft what is now known as, *"The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights"*.

[51] ICESCR, *supra*, note 7.

rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[52]

The States Parties which are signatory to the Covenant are also enjoined to take steps that are necessary in a non-discriminatory manner[53] and regardless of their level of development, ensure respect for minimum subsistence rights for all.[54] The values that are protected are the right to work[55] which includes just and favourable conditions of employment, remuneration and rest,[56] entitlement to social security,[57] food,[58] clothing,[59] housing,[60] medical care,[61] and basic education.[62] Other rights contained in the Covenant are entitlement to protection of the family, particularly children and

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[52] Art. 2(1).

[53] Art. 2(2).

[54] Refer the "*Limburg Principles*", especially Principles 0.10-0. 13, reported at (1986) 37 *I.C.J. Review* 43, which stated, *inter alia*, that in assessing the adequacy of measures being undertaken to realize these rights, attention should be paid to equitable and effective use of and access to the available resources, including those available through international co-operation and assistance.

[55] Art. 6.

[56] Art. 7.

[57] Art. 9.

[58] Art. 11(1).

[59] *Ibid.*

[60] *Ibid.*

[61] Art. 12.

[62] Arts. 13-14.

mothers,[63] and the freedom to engage and benefit from cultural, scientific, literary and artistic expression.[64]

Whenever a State ignores these rights and values or excludes a section of its population from enjoying them,[65] it will be regarded as being in breach of its obligations and determined to be persecuting those deprived of the benefits of the rights. At some point, a nexus can be drawn between some socio-economic rights contained in the ICESCR and civil and political rights enumerated in the ICCPR. Hathaway pointed out a striking example in the deprivation of the socio-economic right to earn a living, or the entitlement to food, shelter or health care and opined that the deprivation of these socio-economic rights may well constitute a deprivation of life or cruel, inhuman or degrading treatment when done in an extreme manner.[66]

There is a residuary class of rights which are contained in the Universal Declaration and are not specifically listed in either the ICCPR or the ICESCR but are nonetheless worthy of mention as core values in a civilized State. These include the right to be free from arbitrary deprivation of property,[67] and the right to be protected against unemployment.[68] It is submitted that notwithstanding the fact

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[63] Art. 10.

[64] Art. 15.

[65] "*The Limburg Principles*", *supra*, note 59, at Principle 0.7. states that: "[s]ome obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in article 2(2) of the Covenant."

[66] J.C. Hathaway, chapter 1, *supra*, note 3 at 111. See also *Cheung -v- Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.) at 325 where it was stated that a child who would experience hardships including deprivation of medical care, education opportunities and food would suffer concerted and severe discrimination, amounting to persecution.

[67] UDHR, *supra*, note 7, at Art. 17

[68] Art. 23.

that these rights are not contained in either the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights, if they are violated arbitrarily and in a discriminatory manner, the violation could constitute persecution to the extent of being used as a basis for claiming refugee status and international protection by the victim.[69]

The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*[70] is another international human rights instrument. This *U.N. Torture Convention*, as CAT is alternatively referred to, prohibits, *inter alia*, the return of a person to another State where there are substantial grounds for believing the person will be tortured or subjected to cruel, inhuman or degrading treatment.[71] For the purposes of the Convention, torture is defined as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[72]

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[69] In *Ramirez, Rosa Etelvina -v- S.G.C.* (F.C.T.D., no. IMM-1192-94), it was held that confiscation of property, *simpliciter*, is not sufficiently grave to constitute persecution. In respect of protection against unemployment, it has been held that permanently depriving an educated professional of his or her accustomed occupation and limiting the person to farm and factory work constituted persecution. See *He -v- Canada (Minister of Employment and Immigration)* (1994), 25 Imm. L.R. (2d) 128 (F.C.T.D.). It should be mentioned that the courts in Canada have held that economic penalties may be an acceptable means of enforcing a state policy where the claimant is not deprived of his or her right to earn a livelihood. See, *Cheung, supra*, note 64; and *Lin -v- Canada (Minister of Employment and Immigration)* (1993), 24 Imm. L.R. (2d) 208 (F.C.T.D.) at 211.

[70] Adopted 10 December 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, 23 I.L.M. 1027. Canada signed the Convention at New York on December 10, 1984 and ratified it in 1987.

[71] *Ibid.*, Article 3. See the corresponding provision in Art. 7 of the *International Covenant on Civil and Political Rights, 1966 ("ICCPR")*.

[72] *Ibid.*, Article 1(1).

In situations of civil conflict, a considerable number of these human rights cannot be guaranteed by the State involved. The natural consequences of intensive fighting include the collapse of social order and neglect of the protection of basic rights of the population. For instance, it will be unrealistic to expect a State in civil conflict to guarantee freedom from arbitrary deprivation of life, protection against torture or cruel, inhuman or degrading punishment or treatment, the right to internal movement and choice of residence, the freedom to leave and return to one`s country, the protection of personal and family privacy and integrity, liberty of opinion, expression, assembly and association, to mention a few.

On the international level, Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR)[73] protects against torture or cruel, inhuman or degrading punishment or treatment. Also the *Convention Against Torture*[74] provides in its Article 3 that no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing he would be in danger of being tortured. These international instruments[75] provide good bases to argue that authorities of a sovereign State should be prevented from forcibly removing an innocent victim of civil war from its territory with a view to returning such a person to his or her home country where there is substantial likelihood that he would face torture, or cruel, inhuman or degrading treatment. This international obligation straddles a rigid categorization of refugees and non-refugees. Thus even if

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[73] *Supra*, note 30.

[74] *Supra*, note 70. The Convention (*"CAT"*) was signed at New York on December 10, 1984 and ratified in 1987 by Canada.

[75] See also the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, Eur. T.S. No. 5, 213 U.N.T.S. 221 which states in its Article 3 that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

an innocent victim of civil war is unable to satisfy the requirements of the 1951 Convention as a Convention refugee, the decision-maker in Canada ought to take into account any consistent pattern of flagrant or massive violation of human rights in the country where the civil war victim is to be returned. The odds, given the general nature of civil wars and the indiscriminate effects of aggression and attacks which are the natural consequences of controlled pursuit of military objectives, are likely to tilt in favour of such civil conflict victim. It is presumable that making the decision whether such grounds exist or not is fundamentally factual and objective and therefore should not present much difficulty in assessing.[76] The reality in civil conflict situation is that respect for human rights can never be guaranteed and cruel, inhuman and degrading treatment of civilian population are common in such situations.[77]

It is posited that the removal of a person, including an innocent victim of civil armed conflict, to a country where there is a serious risk to his life[78] constitutes, *per se*, a violation of his or her rights. In the words of David Matas, "the violation lies in the exposure of a person to the violation of these rights in another country."[79]

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[76] See, D. Matas, *supra*, chapter 3, note 87 at 24-26. The author opined that although human rights instruments are available for protection of innocent victims fleeing civil war, they are subject to variable interpretations.

[77] G.J.L. Coles, Chapter 3, *supra*, note 2.

[78] D. Matas, *supra*, note 76.

[79] *Ibid.*

The category of those who are raising conscientious objection to a civil armed conflict is equally worthy of examination from a human rights law perspective. Article 18(1) of the *International Covenant on Civil and Political Rights*[80] provides that:

> " Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, practice and teaching."

Pursuant to this guaranteed right, a person may decide to flee his country of nationality because he does not wish to participate in an armed conflict raging in the State. Several reasons may be responsible for this unwillingness to join any of the warring parties in the civil conflict. If the reason for evading participation in military service is based on a conscientiously held political or religious belief, an applicant should be eligible for refugee status. The belief being envisaged as possible bases for a claim could either be one where the claimant is opposed to the use of force in all circumstances or a belief opposed to the use of force in violation of international standards.[81]

In 1987, the United Nations Commission on Human Rights resolved that States should refrain from subjecting conscientious objectors to imprisonment[82] and reaffirmed the right to conscientious objection in 1989.[83] The U.N.H.C.R. *Handbook* also states that where "the type of military action with which an individual does not wish to be associated is condemned by the international community

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[80] *Supra*, note 34. See also the provisions of s. 2(a) of the Canadian Charter of Rights and Freedoms, *supra*, note 1, which states, *inter alia*, that: [e]veryone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; . . ."

[81] The phrase "violation of international standards" includes violation of human rights. Refer also the discussions in Chapter Three of thesis on evasion of military service.

[82] Resolution 1987/46.

[83] Resolution 1989/59.

as contrary to basic rules of human conduct, punishment for desertion or draft evasion could, in light of all other requirements of the definition, in itself, be regarded as persecution."[84]

The Federal Court of Appeal has held in the case of *Zolfagharkhani*[85] that chemical warfare is contrary to basic rule of human conduct and by virtue of that legal position, the conscientious objection of Zolfagharkhani to participate as a paramedic in chemical warfare being planned by Iran was a valid basis for a refugee claim. The Court remained silent on the issue whether conscientious objection, *simpliciter*, could support a refugee claim. The Court of Appeal held that the issue was not raised by the record and therefore it would not be dealt with. It is submitted that whenever a claimant can demonstrate that human rights of non-combatants civil population in a civil war zone is being violated, (which is almost always the case when there is a situation of internal armed conflict), and he has a conscientious objection to the conflict on that basis, he should be eligible to surrogate international protection as a refugee if he flees the situation to another country.[86]

4.5. The Geneva Conventions as Protective Mechanism for Civil Conflict Victims

Article 3 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War provides that in the case of armed conflict not of an international character occurring in the

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[84] U.N.H.C.R. *Handbook*, Chapter 3, *supra*, note 13 at paragraph 71. At the regional/international level, a Committee of Ministers of the Council of Europe in 1987 recommended alternative services for conscientious objectors. The European Parliament, in October 1989, passed a resolution calling for the right of all conscripts to refuse to serve on grounds of conscience. (See Recommendation R.87(8) of 9 April 1987). At the Conference on Security and Cooperation in Europe which met in June 1990 in Copenhagen on the Human Dimension, participating States agreed to introduce alternative service for conscientious objection, where none was hitherto existing.

[85] *Supra*, note 26.

[86] The claimant however needs to establish that the conscientious objection is authentic and sincere.

territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgments pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples.
> (2) The wounded and sick shall be collected and cared for.[87]

The International Court of Justice (ICJ) in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua -v- U.S.)*[88] held that common article 3 of the Geneva Conventions is declarative of a peremptory norm of international law and is *jus cogens*.[89] In the case, the jurisdiction

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[87] This article is oftentimes referred to as Common Article 3. See Chapters 1 & 3 of thesis for further discussions.

[88] 1986 ICJ *Reports* 14. Hereinafter referred to as the "*Nicaragua* case".

[89] *Jus cogens* is encapsulated in Article 53 of the Vienna Convention on the Law of Treaties, 1969 to the effect that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law, which is said to be a norm accepted and recognised by the international community as one from which no derogation is permitted, and which can only be modified by a subsequent norm of the same character. Article 64 of the same instrument also states that if a new peremptory norm emerges, any existing treaty which is in conflict therewith becomes void. Further, Article 71 requires the parties to eliminate as far as possible the consequences of any act performed in reliance on any treaty provision whic conflicts with a peremptory norm of international law, and to bring their mutual relations into conformity therewith. D. P. O'Connell said: "[t]he inclusion of the concept of *jus cogens* in the Vienna Convention constitutes an important recognition of the fact that contemporary society is bound together by the acceptance of fundamental principles constituting the rule of law, and that international law is an inseparable concomitant of an international public order" - see D. P. O'Connell, *International Law for Students* (London: Stevens & Sons, 1971) at 104. See also, Schwelb, "Some Aspects of International *Jus Cogens* as formulated by the International Law

of the ICJ was invoked by Nicaragua which was concerned with the activities of the contras within its borders and with U.S. assistance to them. The Court ruled that common article 3 governed the activities of the contras within Nicaragua being a case of non-international armed conflict. Of importance to the analysis in this thesis is the emphasis placed on the centrality of the provisions of article 3 to the Geneva Conventions. The ICJ observed that:

> "Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for one or for the other category of conflict. The relevant provisions are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character"[90]

This decision accords with the legal reality at the international level. Most of the obligations articulated in Common Article 3 have been recognized independently as *jus cogens* and as valid, operative norms of customary international law.[91] The obligations include the rules protecting those that are not participating in the conflict against murder, mutilation, cruel treatment and torture, humiliating and degrading treatment and the taking of hostages.[92]

Commission" (1967) *A. J.* Vol. 61 at p. 946 cited in D. P. O'Connell, *supra*.

[90] The *Nicaragua* case, *supra*, note 88 at 114. It should be observed that in the *Corfu Channel* case (United Kingdom -v- Albania), 1949 ICJ *Reports 4*, the International Court of Justice had earlier referred to the content of the provisions of article 3 as "elementary considerations of humanity".

[91] M. von Sternberg, *supra*, chapter 3, note 63z.

[92] *Ibid.*, at 173. The bar against murder, extermination, enslavement and other inhuman acts is contained in the Nuremberg Charter which is perceived as reflecting peremptory norms which neither States nor individuals may abrogate - see, the *Charter of the International Military Tribunal*, in force 8 August 1945, 82 U.N.T.S. 279; see also, Parker & Neylon, "Jus Cogens: Compelling the Law of Human Rights" 12 *Hastings Int'l & Comp. L. Rev.* 411, 432-4 (1989). The bar against torture and other cruel, inhuman or degrading treatment has also been held to be *jus cogens* to the effect that a violation would amount to an international crime: see, for example, Commission on Human Rights Res. 1985/33, 1985 UN ESCOR, Supp. (No. 2) at 71: UN Doc. E./1985/22. The bar against the taking of hostages has widely been seen as an

In the United States, the decision of the International Court of Justice in the *Nicaragua* case has neither been adopted nor followed. For instance, in the *Matter of del Carmen Medina*[93] the Board of Immigration Appeals considered the case presented by the respondent, a native and citizen of El Salvador, who asserted that a correct interpretation of the Fourth Geneva Convention barred her repatriation to El Salvador because of the violations taking place there; and that as a matter of customary international law, she was entitled to a form of non-deportability for as long as the civil war continued.[94] The Board determined that neither the Fourth Geneva Convention nor customary international law conferred upon the respondent a right of non-deportability which she could invoke in an administrative expulsion proceedings.[95] It found that common article 3 which prohibits, *inter alia*, inhuman treatment of those who are *hors de combat*, was binding solely upon parties to the conflict. The Board came to the conclusion that since the United States was not a party to the conflict in El Salvador, no responsibilities could flow from the provisions of common article 3.[96] The net

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emergent rule under customary international law as constituted in the *International Convention Against the Taking of Hostages*, adopted by the UN General Assembly on 17 Dec. 1979 and by the proliferation of treaties criminalizing high-jacking.

[93] 19 *I & N Dec.* 734 (BIA 1988); see also the earlier decision by a U.S. Immigration Judge on the matter in Case No. A26-949-415 (U.S. Dept. of Justice, Exec. Office for Immigration, 25 July, 1985).

[94] *Ibid.*, at 735.

[95] *Ibid.*, at 747.

[96] Ibid., at 734, 737-38. The American Board of Immigration Appeals also rejected the argument that Article 1 of the Fourth Geneva Convention, providing that the High Contracting Parties 'undertake to respect and to ensure respect for' the Convention, could provide the basis for a claim of non-deportability: *ibid.*, at pp. 738-40.

effect of the Board`s decision is to deny the *jus cogens* characteristic of Common Article 3 as found by the International Court of Justice in the *Nicaragua* case.[97]

In the Canadian case of *Sivaraj -v- Canada (Minister of Citizenship and Immigration)*[98] the provisions of the *Geneva Conventions Act* was considered regarding a matter of stay of deportation order. The case concerned a motion by the respondent Minister to strike out the applicant`s statement of claim, and a motion by the applicants for a stay of execution of removal orders. The applicants were all from Sri Lanka and had failed to demonstrate a well-founded fear of persecution. Removal orders were issued. The applicants then filed statements of claim in order to obtain declaratory relief that the removal orders violated sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* and that they contravened the *Geneva Conventions Act* (GCA).

The Federal Court, Trial Division in this case struck out the applicants' statement of claim but granted their application for a stay of execution of the removal orders. The Court was able to examine the scope of the Minister's power and its alleged obligations under the Geneva Conventions Act. The Court reviewed the provisions of s. 52 of the Immigration Act[99] which enabled the Minister

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[97] *Supra*, note 88. See also the case of *American Baptist Church -v- Meese* [712 F. Supp. 756 (N.D. Cal.1989)] to demonstrate the trend in the United States which tilts towards the rejection of arguments based on Geneva Conventions as *jus cogens*.

[98] [1996] F.C.J. No. 32, (January 9, 1996, Tremblay-Lamer, J.)

[99] It provided that:

(1) Unless otherwise directed by the Minister, a person against whom an exclusion order or a deportation order is made may be allowed to leave Canada voluntarily and to select the country for which that person wishes to depart.

(2) Where a person is not allowed to leave Canada voluntarily and to select the country for which he wishes to depart pursuant to subsection (1), that person shall, subject to subsection (3), be removed from Canada to:

(a) the country from which that person came to Canada;

(b) the country in which that person last permanently resided before he came to Canada;

(c) the country of which that person is a national or citizen; or

to decide upon the country of removal. Tremblay-Lamer, J., opined that upon reading the provisions of the Act, it is up to the court to determine whether the Minister has an implicit obligation to examine or consider any other type of federal legislation, in making a decision under section 52. The FCTD held that it has the jurisdiction, in a judicial review hearing/application, to examine the scope of the Minister`s power and its alleged obligations under the Geneva Conventions Act.[100] The Court proceeded to hold that the applicants met the test for a stay of execution of the removal orders and stated in its conclusion that they would also have suffered irreparable harm as a result of deportation, and the balance of convenience favoured granting the stay.

It is contended that in Canada, the provisions of Common Article 3 may be useful to a civil conflict victim who is requesting the Court to grant him a temporary stay in the country pending the conclusion of an internal armed conflict taking place in his country of nationality. This contention is however predicated on the proof by the applicant that there are consistent human rights violations in the country in issue as these will inevitably cause hardship or irreparable harm to him or her. Human rights violations in situations of civil war can be deduced from grave breaches of the Fourth

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(d) the country of that person`s birth.

(3) Where a person is to be removed from Canada and no country referred to in subsection (2) is willing to receive him, the person, with the approval of the Minister, or the Minister, may select any other country that is willing to receive that person within a reasonable time as the country to which that person shall be removed.

(4) Notwithstanding subsections (1) and (2), where a removal order is made against a person described in paragraph 19(1)(j), the person shall be removed from Canada to a country selected by the Minister that is willing to receive the person.

[100] See also, *Mobarakizadeh -v- Canada* [1993] F.C.J. No. 1394, online: QL (FCTD) (Nadon, J.), where it was held that the Federal Court, Trial Division, on judicial review and pursuant to s. 18(3) of the Federal Court Act, had the jurisdiction to entertain a request for declaratory relief against a federal board by examinig whether certain provisions of the Passport Office`s Internal Guidelines infringed the UN Convention.

Geneva Convention.[101] Consequently, if a civil conflict victim can establish that the provisions of Common Article 3 are being violated in his or her country of nationality, there is nothing preventing him or her from invoking the provisions of the Geneva Conventions before the Court in Canada given the weight of the ICJ decision in the *Nicaragua* case and the added advantage of the provisions of a Canadian domestic statute, i.e. the *Geneva Conventions Act*.[102]

4.6. Temporary Refugee Claim as Protective Mechanism for Civil Conflict Victims

Some legal scholars have asserted the existence of the concept of temporary refugee as a customary norm of international law.[103] According to them, the norm prohibits a State from forcibly repatriating foreign nationals who find themselves in its territory after having fled generalized violence and other threats to their lives and security caused by international armed conflict within their own State. This temporary protection is to last until the violence ceases in the refugee's own State and that State can assure the security and protection of its citizens.[104]

In the words of O'Connell, the formation of customary international law,

> ". . . is a complex process involving the practices of States, that is, the decisions of the men who advise them or act on their behalf, and the practices of the international organisations, as well as the decisions of international and national courts on disputed

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[101] *Supra*, note 87.

[102] *Geneva Conventions Act*, R.S.C. 1985, c. G-3, c. 14. Refer, *Sivaraj* case, *supra*, note 98.

[103] D. Perluss & J. Hartman, "Temporary Refuge : Emergence of a Customary Norm" (1986) 26 *Virginia Journal of Int'l Law* 551.

[104] D. Matas, *supra*, note 76 at 18.

> questions of international law and the meditations of jurists who organise and evaluate the amorphous materials of State activity."[105]

Article 38(1)(b) of the Statute of the International Court of Justice provides that the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international custom, as evidence of a general practice accepted as law.

From the perspectives of jurists, two basic elements must be established before a custom can transform into a norm of international law. First, there must be a repetition of similar acts by the competent State authorities of many, or at least of some countries. Secondly, there must exist a sentiment that such acts are juridically necessary to maintain and develop international relations. O'Connell opines that 'the first element is mere usage, which by itself does not make law; the second is an intellectual conviction according to which identical patterns of fact should lead to reciprocal behaviour patterns'.[106]

The practice accepted by sovereign States within the Organisation of African Unity (now African Union[107]) as evidenced by the *O.A.U. Convention*[108] and the practice evidenced by the Organisation of American States' *Cartagena Declaration,*[109] with respect to the conception of a refugee has been regarded as a norm of customary international law by some legal writers.[110]

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[105] D.P. O'Connell, *supra*, note 89 at 7. See also, the *Asylum* case, (1950) I.C.J. *Reports* 266 and the *Anglo-Norwegian Fisheries* case, (1951) I.C.J. *Reports* 116.

[106] D.P. O'Connell, *supra*, note 89 at 8.

[107] Refer Chapters 1 & 5 of thesis.

[108] Chapter 1, *supra*, note 8.

[109] Chapter 1, *supra,* note 9.

[110] See D. Matas, *supra*, note 76, for a similar argument.

The second test or element prescribed by O'Connell to the effect that there must exist a sentiment that such acts are juridically necessary to maintain and develop international relations presents an issue for consideration. Although it may initially appear that the regional nature of these instruments[111] is a constraining factor, it is contended that the custom and practice of the members of these two organisations (i.e. the OAU and OAS), recognising the concept of temporary refugee status as being necessary for the enhancement of international relations, is sufficient to crystallise such a concept into one universally regarded as a customary norm of international law.

In the United States, there are conflicting signals as to the existence of a customary norm of international law which recognises the status of a temporary refugee. The District Court in the case of *American Baptist Church -v- Meese*,[112] held that because the United States' Congress did not provide expressly for the concept of temporary refugee in the *Refugee Act* of 1980, it is presumed that Congress has rejected it even if it exists at all as a customary norm of international law. However, in the case of *Maria Elena Santos-Gomez*,[113] the Immigration Judge found that one Ms. Santos-Gomez, her mother and daughter, were not refugees, but nonetheless could not be deported to El Salvador because of a right to non-return to a country engaged in civil war. The Judge held that this right is based on the norm of temporary refuge which is recognized in international State practice and legal obligation, and was therefore binding on the Court.

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[111] *Op. cit.*, note 106.

[112] *Supra*, note 97.

[113] (24 August, 1990), No. A-29-564-781 - (P. Mejelski, Immigration Judge).

In Canada, the principle of non-return that is provided for in the legislation is restricted to those who have been found to be protected persons or persons recognized as Convention refugees.[114] The responsibility of determining who qualifies for this status is exclusively done by the Refugee Protection Division of the Immigration and Refugee Board which uses the Convention refugee definition as provided by the domestic legislation, IRPA. An individual who falls within the norm of temporary refuge, but falls outside the scope of a Convention refugee claim may have a difficulty locating an appropriate forum where he or she could make a claim because the IRB has no jurisdiction to consider such applications.

There has not been any known case of an applicant seeking the status of a temporary refugee in Canada. It is suggested however that a claimant who has been denied refugee status by the IRB may commence an independent court action at the Federal Court, Trial Division. Matas[115], proffers that this course of action is possible through the filing of a motion requesting an order of prohibition to prohibit the Government of Canada from deporting the applicant to a country torn by civil war, and for a stay of removal order pending the hearing of the prohibition motion. He correctly observed that there is no reported decision on such an action.

The residue of controversies on whether the concept of temporary refuge is extant in customary international law as a norm or not should be settled in favour of its existence. It is contended that considering the substantial number of African nations and Latin American States that are members

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[114] Section 115(1) provides that: "[a] protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment."

[115] D. Matas, *supra*, note 76 at 21.

of the international community as evidenced by membership in the United Nations, international instruments to which majority of the States from those two regions subscribe should be regarded as capable of precipitating a customary norm of international law which is binding on the international community. To that extent the *OAU Convention*[116] and the *Cartagena Declaration*[117] should be viewed as commanding a sufficiently wide acceptance which establishes the principles embedded therein, including the concept of temporary refugee, as customary norms of international law.[118]

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[116] *Supra*, note 108.

[117] *Supra*, note 109.

[118] Refer D. Matas, *supra*, note 76 at 18-19.

CHAPTER FIVE

THE REGIONAL / INTERNATIONAL REFUGEE INSTRUMENTS IN PERSPECTIVE

This section focuses on the efforts of regional organizations to ascribe meaning to the term "refugee". They come up for discussion at this stage because the instruments have been mentioned very frequently in previous chapters of the thesis. Furthermore, they constitute the model which is being recommended for adoption, in a slightly modified manner, in the thesis.

One fact that runs through these regional activities is that they have all striven to erect standards that have extended the definition established in the 1951 Convention. This is not surprising because they bear the brunt of the responsibility of those categories of refugees that are outside the Convention mandate.[1] The Organization of African Unity, the Organization of American States, the Council of Europe and the Asian African Legal Consultative Organization will be examined *seriatim* in the discussion below.

5.1. The Organization of African Unity (O.A.U.)

The Organization of African Unity was the first of the regional arrangements to integrate the reality in the developing world to the 1951 Convention's definition of the "refugee" term. The OAU in 1969 opened a new vista in the concept by extending protection to all persons compelled to flee across national borders by reason of any man-made disaster, including the class of persons sometimes called 'displaced persons', irrespective of their perception of fear of persecution. Under the OAU

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[1] With the exception of the Council of Europe's efforts in 1976.

Convention governing the specific aspects of refugee problems in Africa[2], state parties while still recognising the 1951 Convention definition of a refugee agreed that:

> The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[3]

A number of analytical statements emerge from the OAU definition. In the first place, there is a recognition of the possibility of abuse arising not directly from the deliberate acts of the government of the refugee's State of origin, but occurring indirectly as a result of loss of authority by this refugee's State of origin or nationality pursuant to external aggression, occupation, or foreign domination. Second, it is apparent that the OAU definition implicitly recognises the legitimacy of flight in circumstances of generalized danger as may be occasioned by any event that seriously disturbs public order.[4] Third, the OAU definition leaves open and indeterminate the rationale or ground for the impending harm that compels the flight in contrast to the 1951 Convention which makes it mandatory for the refugee to demonstrate that the harm feared has a nexus with his civil or political status. Thus, it is possible for an individual putative refugee to determine for himself when harm is sufficient to prompt a flight to safety. Finally, the OAU definition extends international protection to persons who seek to escape serious disruption of public order "in either part or the

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[2] Chapter One, *supra*, note 8. The "Organization of African Unity" is now known as the "African Union".

[3] Article 1(2) of the OAU Convention.

[4] This is reminiscent of the accords entered into during the period between 1935-1939 which recognised the concept of group disfranchisement.

whole" of their country of origin.[5] This OAU approach appears to have taken into cognisance factors like the political instability of African States where rapid shifts in governmental control of power are phenomenal and consequently there is no real guarantee of a "safe" region at any given point in time.

The innovative definition in the OAU Convention, overall, has succeeded in making available the framework by which an enhanced UNHCR activity in Africa can be justified. It also has far reaching influences on the 1977 Draft Convention on Territorial Asylum and a number of other regional accords` perception of the "refugee".

5.2. The Organization of American States (O.A.S.)

In 1984, the Cartagena Declaration was adopted by ten[6] Latin American States as a response to the 1951 Convention`s default in the recognition of the numerous involuntary migrants from generalized violence and oppression in Central America. The States declared that, in addition to Convention refugees, protection should be extended to:

> . . . persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.[7]

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[5] This is a significant move away from the practice generally referred to as the "internal flight alternative" theory which posits that a person compelled to flight should make reasonable efforts to seek protection within a safe part of his own country before looking for refuge abroad.

[6] They include: Belize, El Salvador, Mexico, Venezuela, Colombia, Guatemala, Nicaragua, Costa Rica, Honduras and Panama. Chapter One, *supra*, note 9.

[7] *Ibid.*

The General Assembly of the Organization of American States approved this definition in 1985 and resolved to urge Member States to extend support and, insofar as possible, to implement the conclusions and recommendations of the Cartagena Declaration on Refugees.[8]

On a note of distinction from the OAU definition, which inspired the OAS model, applicants for refugee status under the latter must show that "their lives, safety or freedom have been threatened". This removes the determination of the perceived harm and the attendant danger from the subjective perception of the individual as the OAU definition allows. Further, the OAS definition does not in express terms extend protection to persons who flee serious disturbance of public order that affects only a part of their country as the OAU definition does. The OAS definition ultimately stands out as a compromise between the 1951 Convention and the OAU Convention in that while it expands the "persecution" standard of the Convention to integrate possible abuse arising from socio-political upheavals so common in developing nations, it has been conscious of restricting obligation for protection only to those cases where it can be demonstrated that there also exists a real risk of harm to other persons in the same situation as the refugee claimant.

5.3. The Council of Europe

In the Parliamentary Assembly`s Recommendation 773 in 1976, the Council of Europe expressed its concern with respect to the situation of "*de facto* refugees" who are defined therein as, persons who either have not been formally recognized as Convention refugees (although they meet the Convention`s criteria), or who are "unable or unwilling for . . . other valid reasons to return to their

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[8] *Declaracion de Cartagena* - see *Annual Report of Inter-American Commission on Human Rights 1984-85*, OEA/Ser.L/II.66, doc. 10. rev. 1, at 190.

countries of origin."[9] This observation sets the stage for the invitation of member governments of the Council of Europe to apply liberally the definition of 'refugee' in the Convention and not to expel de facto refugees unless they will be admitted by another country where they do not run the risk of persecution.

With this, the Council of Europe can be said to have introduced standards of refugee protection which definitely transcend the Convention definition, but are more modest than those of the OAU and the OAS. The Council of Europe Recommendation, in its yet partial implementation, has undoubtedly acknowledged the reality of the existence of refugees which are outside the contemplation of the 1951 Convention but nonetheless are entitled to claim protection.

5.4. The Asian African Legal Consultative Organisation (AALCO)

The Asian African Legal Consultative Organisation (which had earlier existed as a Committee) adopted at its 8th session in Bangkok a set of principles concerning the Status and Treatment of Refugees, 1966 (commonly referred to as the "Bangkok Principles").[10] Subsequently in 1970 and 1987, the Asian African Legal Consultative Committee (AALCC) adopted two addenda on the right of refugees to return and the norm of burden- sharing respectively. The works of the Committee in these areas have been carried out in consultation with and support of the office of the United Nations High Commissioner for Refugees (UNHCR).

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[9] *"Situation of de facto refugees "* - (Adopted at the Third Part of the 27th Ordinary Session, 1976). Available online: http://www.coe.int/.../Asylum_refugees_and_stateless_persons/Text_and_documents. Accessed on July 21, 2003.

[10] Chapter One, *supra*, note 11.

In the AALCO's latest effort, (which also represents the most recent expansion of the definition of the term "refugee"), the organisation proposed an enlargement of the definition of refugee status keeping in view other regional and international conventions and declarations by adopting the Resolution on the Status and Treatment of Refugees on February 23, 2000 to the following effect:

> Article1(1). A refugee is a person who, owing to persecution or a well founded fear of persecution for reasons of race, colour, nationality, ethnic origin, political opinion or membership of a particular social group:
>
> (a) leaves the State of which he is a national, or the country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident, and
>
> (b) being outside of such a State or Country, is unable or unwilling to return to it or to avail himself of its protection.
>
> Article 1(2). The term "refugee" shall also apply to every person who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of the country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[11]

Aside the fact that this is chronologically the latest attempt at expanding the meaning of the term "refugee", the striking similarity between the AALCO definition and that of the OAU is worthy of note. This probably stems from the fact that Asian nations and African States have similar experiences in terms of refugee producing circumstances and the attendant aftermaths.

It can be ascertained for contemporary international protection purposes that whether the abuse the putative refugee suffers is a denial of formal protection by the national community/state, a campaign of generalized disfranchisement, refusal to allow individuals political self-determination, or intentionally designed acts of deliberate harm, the functional meaning of the term "refugee" has

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[11] See Annex 1- the Draft Revised Consolidated Text of the "Bangkok Principles"- of the Resolution on the "Status and Treatment of Refugees" adopted on February 23, 2000. Available online: http://www.aalco.org. Accessed on July 21, 2003.

expanded to respond to the need to protect involuntary migrants in flight from States which have failed in the performance of their basic duty of protection.

CHAPTER SIX

CONCLUSION

6.1. Observations

The research in this thesis shows that four categories of refugees are extant in contemporary international law. The first category consists of those that are defined by the 1951 *Convention relating to the Status of Refugees* and the 1967 *Protocol relating to the Status of Refugees*. Those individuals who meet the criteria stipulated under these international instruments are described as Convention refugees. They are entitled to claim protection against return to a country in which they fear persecution. They are eligible to claim in addition the full range of rights that are set out in the Convention and make demands on the institutional facilities available through the United Nations High Commissioner for Refugees` office.[1] The second category includes refugees who are protected by a regional arrangement/agreement. These regional arrangements refer to those defined as refugees severally and distinctively by the Organization of African Unity (OAU) *Convention governing the specific aspects of refugee problems in Africa*, the Organization of American States (OAS) *Cartagena Declaration* of 1984, and the Council of Europe`s *Parliamentary Assembly`s Recommendation 773* in 1976. This category of refugees may be at risk of return to situations of serious disturbance of public order as distinguished from situations of persecution. They are generally protected from return within the specific framework of the OAU Convention and the OAS

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[1] See, J. C. Hathaway, chapter1, *supra*, note 3 at p.27.

Declaration.[2] The third category comprises refugees who fear harm as a result of serious disturbances of public order but are unable to claim protection under any special regional arrangement as highlighted for the second category. These are refugees from man-made harm who are eligible for special consideration prior to return to their State of origin, but are not entitled to claim protection from return as of right. They are, in sum, at the mercy of the provisions of the granting State's domestic legislation.[3] The final category groups as refugees all persons who are involuntary migrants from natural or man-made causes. Individuals in this group may claim institutional support from the office of the United Nations High Commissioner for Refugees through material assistance and aid in voluntary repatriation or resettlement. They are generally ineligible to claim protection under international law.[4]

Canadian refugee law is about the conferral of protection to persons that are eligible under the provisions of the *Immigration and Refugee Protection Act*. Under this statute, refugee protection is conferred on a person when the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons.[5] Secondly, refugee protection is conferred on a person when the Board determines the person to be a Convention refugee or a person in need of protection[6] and finally, refugee protection can be conferred when the Minister

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[2] J.C. Hathaway, *ibid.*

[3] E.g. s. 97(1) & (2) of the Canadian *Immigration and Refugee Protection Act* (IRPA).

[4] J.C. Hathaway, *supra,* note 1.

[5] Section 95(1)(a) of IRPA.

[6] S. 95(1)(b) of the *IRPA*.

allows an application for protection, except in the case of a person described in subsection 112(3) of the *IRPA*.[7]

The legal position in Canada is that claims involving situations of civil war, as in all other refugee claims, need to be supported by the satisfactory establishment, on the part of the claimant, of all of the elements of the statutory definition of Convention refugee.[8] In this respect, the Chairperson of the Immigration and Refugee Board issued Guidelines [9] which members of the Refugee Protection Division are to apply in determining refugee claims brought by victims of civil conflicts. The I.R.B., while acknowledging the difficulty in handling this kind of claim because of the inherent problem of determining whether or not there is a linkage between the persecution feared and one or more of the Convention grounds, is generally guided by the proposition that while there is nothing in the definition of Convention refugee which excludes its application to claimants fearing return to situations of civil

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[7] S. 95(1)(c) of the *IRPA*. The discretion of the Minister however, can not be extended to any person who (a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality; (b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; (c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or (d) is named in certificate referred to in subsection 77 (1).

[8] It is observed that pursuant to the Council of Europe resolutions, individual European countries have put in place some domestic protection arrangements which make it possible to accommodate persons who do not meet the Convention refugee requirements but are nonetheless victims of armed conflicts and broad-based human rights violations. Sweden uses the concept of "B" status in Swedish law to temporarily admit such persons with residence permits. Portugal grants asylum to armed conflict victims under its Act 38/80, August 1, 1980, Art. 5, para. 2, amended by Act 415/83, November 24, 1983. German law makes provision for the residence of persons who face civil war or foreign occupation in their country of origin under Deutscher Bundestag, 10 Wahlperiode, Drucsache 10/3346 (1985). See further, J.C. Hathaway, *supra*, note 1, at 22.

[9] The Guidelines, "Civilian Non-Combatants Fearing Persecution in Civil War Situations" - available online at: http://www.cisr.gc.ca/legal/guidline/civilian/cw_a_e.stm , accessed on July 20, 2003 were issued pursuant to section 65(3) of the Immigration Act, 1976 on March 7, 1996.

war, those fearing return to such situations ought not to be deemed Convention refugees by that fact alone.

6.2. Recommendations

It is very clear that the 1951 Convention, which some writers refer to as the *Magna Carta* of international refugee law,[10] provides for a definition which requires a putative refugee to show a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group and political opinion. The express words of the Convention did not include victims of civil conflicts as being eligible for international protection. The international community should begin to think of amending the 1951 Convention to reflect contemporary reality inherent in the potentiality of armed conflict to generate great numbers of victims that are deserving of international protection which their home State has failed to offer or can simply not offer. A significant number of regional instruments, as pointed out earlier, have already accorded this recognition to victims of armed conflict. Nothing stops the United Nations from initiating an elaborate reform of the 1951 Convention and its Protocol as a response to this reality. It is recommended that in line with the provisions of the Organization of African Unity's *Convention governing the specific aspects of refugee problems in Africa*, 1969, the Organization of American States' *Cartagena Declaration*, 1984, and the "*Bangkok Principles*" of the Asian African Consultative Organisation (AALCO), refugee protection should be extended to cover victims of internal and international armed conflicts, and those who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression or other circumstances which have seriously disturbed

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[10] J. Kumin, Chapter One, *supra*, note 5.

public order. In order to prevent the situation from becoming a "free-for-all" scenario for victims of armed conflict, a mechanism should be put in place to ascertain those who are innocent victims of the civil war. This process will be used to sift out economic migrants and those who are not innocent victims in the sense that they were key players in the commencement of the civil conflict.

One of the policies of the Canadian State has been the implementation of special humanitarian programs on an on-going basis in response to situations around the world that justify international relief of humanitarian and compassionate nature. Through these arrangements, persons who do not meet the prescribed criteria under the 1951 Convention and the *Immigration and Refugee Protection Act* and have either been displaced, persecuted or compelled to flee their home countries are granted protection. They are considered as "designated classes" and special set of criteria are prescribed for them for the purpose of determining their eligibility for international protection. The Indo-Chinese Designated Class Program and the Humanitarian Designated Classes[11] are examples of these arrangements.[12] It is suggested that in the line of these examples and because of the peculiar milieu in a continent like Africa where the incidence of war and similar refugee-producing situations are perennial, Canada should craft a special humanitarian initiative to address the problems of the continent at least until the situation there improves. Persons who become victims of internal armed

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[11] This program came into effect in 1997 to provide a more flexible resettlement tool for persons internally displaced or in refugee-like situations. More specifically, it is designed for the selection, through private sponsorship, of refugees personally and seriously affected by situations such as civil war and armed conflicts or because their fundamental rights are not respected.

[12] Refer the *Indochinese Designated Class Regulations*, as amended by SOR/90-533. It applied to citizens of Kampuchea, Laos and Vietnam and prescribed conditions that for them to be eligible for international protection as offered by Canada under this special humanitarian program, they must have left their countries as of April 30, 1975, had not settled elsewhere and had Canadian sponsors willing and qualified to sponsor their resettlement.

conflict through no direct participation in its cause should be given due protection from the resultant ravages.

Furthermore, even if an innocent victim of civil war is unable to satisfy the requirements of the 1951 Convention and the domestic legislation as a Convention refugee, the decision-makers in Canada ought to take into account any consistent pattern of flagrant or massive violation of human rights in the country where the civil war victim is to be returned. The odds, given the general nature of civil wars, are likely to tilt in favour of such civil conflict victim. However, there would need to be substantial grounds for believing that such a person would be in danger of being subjected to torture, or cruel, inhuman or degrading treatment in his home country. It is presumable that making the decision whether such grounds exist or not is fundamentally factual and therefore should not present serious difficulty in assessing. This assertion is made in view of the reality that respect for human rights in civil conflict situations can hardly ever be guaranteed.

In addition to the foregoing, Article 3 of the *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* provides that in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply its provisions as minimum conditions. It is contended that in Canada, the provisions of Common Article 3 may be useful to a civil conflict victim who is requesting the Court to grant him a temporary stay in the country pending the conclusion of an internal armed conflict taking place in his country of nationality. This contention is however predicated on the proof by the applicant that there are consistent human rights violations in the country in issue as these will inevitably cause hardship or irreparable harm to him or her. Human rights violations in situations of civil war can be deduced from grave breaches of the Fourth Geneva Convention. Consequently, if

a civil conflict victim can establish that the provisions of Common Article 3 are being violated in his or her country of nationality, there is nothing preventing him or her from invoking the provisions of the Geneva Conventions before the Court in Canada given the weight of the ICJ decision in the *Nicaragua* case and the added advantage of the provisions of a Canadian domestic statute, i.e. the *Geneva Conventions Act*.[13]

Legal scholars have asserted the existence of the concept of temporary refugee as a customary norm of international law.[14] According to them, the norm prohibits a State from forcibly repatriating foreign nationals who find themselves in its territory after having fled generalized violence and other threats to their lives and security caused by international armed conflict within their own State. This temporary protection is to last until the violence ceases in the refugee's own State and that State can assure the security and protection of its national.[15] The fact that a substantial number of African nations and Latin American States subscribe to regional international instruments that recognize the concept of temporary refugee as a customary norm of international law is sufficient to recognise the norm as universally binding on the international community. The concept of temporary refugee should be recognised as evidence of an existing general practice accepted as law that can be implemented by the International Court of Justice (ICJ).[16]

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[13] *Geneva Conventions Act*, R.S.C. 1985, c. G-3, c. 14.

[14] D. Perluss & J. Hartman, "Temporary Refuge : Emergence of a Customary Norm" (1986) 26 *Virginia Journal of Int'l Law* 551.

[15] D. Matas, chapter 4, *supra*, note 76 at 18.

[16] Article 38(1)(b) of the Statute of the International Court of Justice.

In Canada, the principle of non-return that is provided for in the legislation is restricted to those who have been found to be protected persons or persons recognized as Convention refugees.[17] So far there has not been any known case of an applicant seeking the status of a temporary refugee in Canada. It is suggested however that a claimant who has been denied refugee status by the IRB may commence an independent court action at the Federal Court, Trial Division to assert an entitlement to such a status. This course of action is possible through the filing of a motion requesting for an order of prohibition which prays the Court to prohibit the Government of Canada from deporting the applicant to a country torn by civil war, and for a stay of removal order pending the hearing of the prohibition motion.

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[17] Section 115(1), chapter 4, *supra*, note 113.

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